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# THE BOOK OF ENGLISH LAW

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OF THE MIDDLE TEMPLE

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TO

THE RIGHT HONOURABLE

RICHARD, BARON ATKIN, M.A.

LORD OF APPEAL IN ORDINARY

AND

SIR WILLIAM BEVERIDGE, K.C.B., LL.D.

DIRECTOR OF THE LONDON SCHOOL OF ECONOMICS AND POLITICAL  
SCIENCE, VICE-CHANCELLOR OF THE UNIVERSITY OF LONDON

TO WHOSE INSPIRATION AND ENCOURAGEMENT

ITS PRODUCTION IS DUE

THIS BOOK IS GRATEFULLY DEDICATED

BY THE AUTHOR.



## PREFACE

THE book here presented to the public is the outcome of a project conceived some four years ago by Lord Justice (now Lord) Atkin, and Sir William Beveridge, K.C.B., the Director of the London School of Economics and Political Science. At that time, negotiations were on foot for the establishment of a Chair of English Law in the University of London, to be attached to the School of Economics, which was providing the necessary funds ; and it was an understanding, when the author accepted the invitation of the University to occupy that Chair, that he should undertake, as a part of his professorial duties, a course of lectures and discussions on the fundamental principles of English Law, under the title of " The Elements of English Law." These lectures and discussions were to be for the benefit, not, in the main, of professional lawyers, actual or potential, but of laymen interested in the place of Law in modern communities and its influence on economic and social polity.

Lord Justice Atkin and Sir William Beveridge did not merely advocate this plan, but drew up in consultation a definite scheme or syllabus of the intended course, which the author, in his lectures and in this book, has closely followed. If he may be permitted to say so, he considers it an admirable scheme ; and he feels that whatever appreciation of the arrangement of this book the public may manifest, should be directed entirely to the framers of the scheme and not to the actual writer of the book, which is, appropriately, dedicated to its true originators.

As for the author's own share in the work, he is not likely, after so many years' study of English Law that he prefers not to count them, to under-estimate the difficulty of writing anything about that subject which shall be worth reading, and shall yet be intelligible to the layman. More especially is he unlikely to fall into this error, as the book now presented is not in the least intended to be 'useful' in the commercial sense of the word, i.e. to enable a layman to do his own legal business without the help of professional lawyers. There are books which have that aim, and which make, accordingly, a considerable appeal to a large section of the community. Let them suffice.

The aim of this book is entirely different, and much more ambitious. It is to make the lay reader, English and foreign, understand that the rules of English Law are at once the unconscious expression of the national mind and that, at the same time, they exercise a powerful influence on the mental attitude, and therefore, on the character and conduct, of the Englishman. As is well known, English Law is no artificial and codified system inherited from antiquity or imposed by an autocratic ruler, but a living picture or reflection, formless and difficult to describe, of the unconscious working of the English mind as expressed in tradition, statute, and judicial decision.

It is hardly going too far to say, that not since Blackstone's day (now approaching two centuries ago) has any serious attempt to present this picture as a whole, in literary form, been seriously undertaken. Admirable books on English Law, written for lawyers professional or amateur, exist in abundance. But for a picture of English Law, drawn for, and intelligible to, the layman, we must still go back to Blackstone; and Blackstone's picture, masterpiece as it is, has long ceased to be a true picture



of the English Law of to-day, for English Law is a living and changing thing.

Is it possible for such a picture to be drawn? Only, the author believes, by observing one golden maxim. It has been well said, that every statement about English Law is either a statement of a general rule or a statement of an exception from such a rule. To the professional lawyer, the exceptions (far exceeding in actual number the general rules) are the essential things; for it is they which bring grist to the professional mill. The old type of law-book was, for that reason, concerned almost entirely with exceptions, often barely alluding to the general rules with which, *ex hypothesi*, the lawyer, for whom it was intended, was familiar. To the layman it was, naturally, a nightmare. But, within the last half-century, not a few admirable text-books, clearly setting out the fundamental principles underlying various chapters of English Law, and dealing but lightly with the exceptions from them, have appeared, and have done much to further that revival of sound legal education of which, at one time, there seemed little hope. In this connection it is only necessary to recall the honoured names of Sir Frederick Pollock, Sir William Anson, A. V. Dicey, and F. W. Maitland.

The author of this book can, therefore, plead that, in attempting to explain the principles, as distinct from the exceptions, of English Law, he is but carrying to its logical conclusion a movement which other and greater men have started, and that, though the attempt to embrace a wider subject and appeal to a wider audience, has necessitated some change of methods, he has, at any rate, set before himself the best models, with whose creators he has, in fact, been privileged to enjoy and profit by personal communion.

Even so, he would hardly have ventured to start his book on its voyage, but for the fact that Lord Atkin,

who, as has been said, was himself a joint author of the plan on which it is based, had not further, with great generosity, offered to read and criticize the whole of the work before it went to the printers, and, finally, consented, at the author's request, to contribute to it the valuable Foreword which follows. With such encouragement and help, it would have been cowardly to refuse an opportunity of exalting, however feebly, the fame of one of the Englishman's greatest achievements, viz. the creation of the one great system of indigenous national law which the modern world has produced.

In view of the fact that the book is intended, primarily, for the lay reader, it has not been thought advisable to cumber it with the elaborate system of foot-notes and references to be found in books written for the professional lawyer. But, for the benefit of those readers who may desire to pursue the subject further, a select Bibliography, upon which some care has been expended, has been placed at the end of the text.

Finally, to avoid all misunderstanding, the author desires to emphasize the fact that he treats of English Law only as it is administered in England. English Law has spread round the world; but in each adopted country it has undergone modifications, with which it is impossible here to deal.

The author wishes to thank Mr. Guy Fossick, of Lincoln's Inn, Barrister-at-Law, for the useful Index which he has been good enough to contribute.

LONDON SCHOOL OF ECONOMICS  
AND POLITICAL SCIENCE,  
*February, 1928.*

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116	26	For 'me' read 'him.'
125	19	After 'facts' (first) <i>insert</i> ' ? '
167	35	For 'espceially' read 'especially.'
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280	23	For 'damages' read 'damage.'
311	6 and 7	<i>Transpose</i> '(ii)' and '(i).'
320	15	For 'purchase' read 'purchaser.'
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428	4	<i>Omit</i> 'not.'
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## FOREWORD

BY THE RIGHT HON. THE LORD ATKIN

THE substance of this book was delivered at the London School of Economics in a course of lectures designed to meet the needs of those who take up the subject of Law for the final courses for the degrees in Arts and Economics granted by the University of London. It is the work of the University Professor of English Law, one of the most distinguished teachers of Law in the country; and it needs no more than his name to commend it to the students for whose needs the lectures were intended. But it appeals to me as serving a much wider purpose. Its production is a step towards the goal of securing the recognition of some teaching of law as a factor in a general liberal education. It is the partial acceptance of this ideal that makes the selection by London University of 'law' with its carefully framed syllabus as one of the subjects in the examination for degrees in Arts and Economics such a significant advance.

It has always seemed to me inexcusable that law has ceased to play the part in higher education that it did in the days of Fortescue, and that Locke and Blackstone desired for it in their time. After all, law enters into nearly every relation of social and civic life from birth to death: its maintenance in a reasonable form adapted to present needs is essential to the State. It inculcates a sound morality: and a grasp of its main principles affords an incomparable intellectual training. One would have thought that some knowledge of elementary law is

as essential to the training of the future citizen, as it is admitted is some knowledge of elementary science or of letters. And a lawyer may be forgiven for his belief that even an elementary knowledge of what our English law is would remove much of the distrust of law and law courts that to some extent impedes the free enforcement of civil rights.

But to receive such instruction there must be teachers : and teachers say, how can they teach without a textbook ? Well, here is a book which, whether in the hands of a teacher or of the learner, will be found to cover the ground. Here the layman will find how the very foundations of society were laid : and how the structure is maintained : what law means, how custom crystallised into law and local custom broadened into common law : how law courts and judges developed from the King's household—older institutions than Parliament : how trial by jury is a royal benefit conferred by the King's justices in the place of the remedies of local courts : how Equity arose from the King through his Chancellor mitigating the rigidity of the Common Law. He will learn of the reign of law : and its control of the Executive : of crime and the great overriding presumptions on which the administration of the criminal law is based : he will learn the principles of the law of contract and of wrongs, and will see how both have evolved from a few leading principles developed to meet the circumstances of each new case by a succession of judicial pronouncements. He will learn the principles of construction of statutes and written documents, and may even as legislator or man of business learn to express himself with precision, and thereby save himself much trouble and expense. He will learn something of procedure ; of the different functions

of judge and jury ; and of the rules of evidence as means of ascertaining truth. In short, though this book cannot be guaranteed to make its reader a better citizen, it can be guaranteed to make him better equipped to be a good citizen. I cordially recommend it.

ATKIN.



PART I  
*PRELIMINARY*





## CHAPTER I

### THE NATURE AND DIFFERENT KINDS OF LAW

*LAW* is one of the elemental forces which rule the world. The leaders of mankind—founders of religions and empires, philosophers, successful generals, architects whose works are the admiration of all, men of science whose discoveries have transformed our conception of the universe—all these have, from time to time, appealed to Law as a justification or explanation of their beliefs or conduct. And although it is evident that these different persons use the term ‘law’ in widely different senses, yet there is a sufficient similarity in their language, and a sufficient likeness in the ways in which they deal with their subject, to lead us to think that, unconsciously, they are all appealing to the same fundamental idea or concept, though it is extraordinarily difficult to define exactly the nature of that idea or concept. And this belief is confirmed when we discover, as the work of travellers and anthropologists is increasingly enabling us to discover, that this idea or concept of Law is not confined to civilized peoples, but is to be found, though often in grotesque forms, in primitive communities.

As to the widespread existence of the idea or concept of Law there appears, then, to be very little room for doubt. It is when we come to ask ourselves what exactly is the meaning of this idea or concept, that difficulties arise. It soon, then, becomes obvious, as has been said, that the meanings in which the word ‘law’ is used by different classes of persons are widely different—so different, in fact, that we are at first inclined to wonder whether the identity of the name employed is not purely accidental. Quite clearly, when a physician speaks of the ‘laws of health,’ or a soldier of the ‘laws of strategy,’ or a lawyer

of the 'laws of property,' these persons are thinking, not only of different things, but of different *kinds* of things. The 'laws' of the physician are not rules laid down by human authority; though human skill may draw inferences from them and advise persons to act in accordance with them. On the other hand, the 'laws of property,' of which the lawyer speaks, are, unquestionably, laid down by human authority, though often, as we shall see, in a curiously indirect way; and obedience to them will be enforced by human authority. What are the essential similarities which bind together these various uses of the term 'law'?

This is a difficult question to answer; and anything like an attempt to give a reasoned reply to it would involve a discussion far too technical and elaborate to be useful in a book like the present. But a general survey of the conclusions of the many thinkers who have tried to answer that question seems to lead to the conclusion that the idea or concept of law, to whatever kind of subject-matter applied, always involves the union of two simpler ideas or concepts, that of *order* and that of *compulsion*. The latter is, perhaps, the more prominent of the two, at any rate in Western Europe, where the State, which uses compulsion as one of its most conspicuous instruments, bulks so largely as the promulgator, the enforcer, and the interpreter of law. Still, most thinking persons would admit that a law—at any rate a law of human origin—which had nothing but force to justify its existence, would hardly be law at all, but rather the expression of tyrannical or arbitrary authority, unless it contained also the element of 'order,' to which we have referred. What is this 'order'?

It seems to the writer probable, or at least possible, that the idea of 'order' implied in Law originated in some very primitive perception of the advantages of method and system. Let us suppose some pastoral group, on its way from one camping-ground to another, halted round a well in an oasis of the desert. Imagine the confusion, delay, and ill-feeling that would be aroused,

if the shepherds and their respective flocks were allowed to scramble indiscriminately for places at the well, to arrive at the oasis in any confusion that seemed good to them, and depart in the morning in similar fashion. Probably such was the state of affairs in the earliest days of migrations; but its inconveniences must have been so great, that the introduction of customary rules to replace it by some more convenient system evidently in fact took place. How this early triumph of order over chaos was achieved, it is impossible to say, though hints with regard to it may be gathered from the writers and explorers of anthropology. It is highly improbable, from what we know of primitive society, that it proceeded from a voluntary perception of the rational advantages of the change; for the use of reason by the generality of mankind is a late arrival in history. It is far more likely that it was gradually brought about by the exercise of authority on the part of those members of the community who, by reason of their strength, their age, or their intelligence, found means to make their wishes felt. If so, the intimate connection between order and compulsion, which we have suggested as the elements of Law, was early established.

But if our conjecture (for it is very little more) as to the origin of order and system in primitive communities is at all correct, it explains yet another fact in the evolution of the idea or concept of Law, viz. its extension from the methods of order evolved in a primitive community to the symmetrical sequence of events in non-human and inanimate Nature. The thing that would particularly strike the primitive observer of such customs as those we have conjectured would be the uniformity and continuity of the practices which they produced. Such an observation would be profoundly welcome to the primitive mind, which hates nothing so much as to have to exercise itself in thinking out new problems. Every observer of children (who, in many ways, are extraordinarily like primitive men and women) knows of the fascination exercised on the child-mind by monotonous repetition



and uniformity ("The animals went in two by two"), and the embarrassment, often amounting to real grief, caused by a demand for a choice which involves hard thinking. And when the growing observation of Primitive Man began to extend to things like the habits of animals and birds, the return of the seasons, the appearance of the sun, moon, and stars, and he found that these too appeared to practise a similar uniformity, he naturally drew conclusions as to the origin of this state of things which accorded with his own experience; i.e. he regarded it as the result of the influence of certain superior Powers, who would be mortally offended by any attempt to disregard it. Thus the idea of *order*, and its cognate idea of *compulsion*, spread from human to non-human affairs, being, as civilization advanced, profoundly stimulated by the discoveries of experimental science, which seem (in spite of certain recent rather damaging criticism) to show, that the whole universe with which we are acquainted exists by virtue of certain uniform sequences of phenomena, which it is customary to term 'laws.' The result has been to elevate the idea of Law, with its essence of orderly compulsion, from a mere exercise of power by the stronger over the weaker members of the community, to the dignified position of a function necessary to the existence of the universe as we understand it.

Greatly, however, as the idea or concept of Law has gained in dignity and impressiveness by being extended from human to non-human relations, this expansion has its dangers. It may, for example, lead to a confusion between 'laws' which, whatever their fundamental identity, differ profoundly in their methods of application and the subjects with which they are concerned. Those who believe in the existence of an omnipotent Power or Powers, to whom "all hearts are open and all desires known," quite naturally ascribe to such Powers the prerogative of prescribing rules, not merely for the outward conduct, but for the beliefs, motives, and feelings of the hearts and minds of men. Thus the 'Laws of God' are the subject of study of a special class of persons,



known as theologians, whose object it is to discover and enforce those rules. The sequences of purely physical phenomena are studied by observers whose business it is to elucidate them and make them clear for the benefit of mankind, whose very existence depends upon at least a rudimentary recognition of them ; and the forms which that recognition should take are likewise in charge of various groups of persons, known as 'professions,' of medicine, engineering, mining, and the like. Finally, there is the problem of the enactment, interpretation, and enforcement of rules of conduct for men and women gathered together in communities which we call 'nations,' i.e. large groups of persons occupying definite territories, which consist now, not merely of land, but of the air above it, and even to a limited extent the neighbouring or 'territorial waters' of the sea, and marked off from other communities by an allegiance to an institution which we call a State. The rules which this State enacts, interprets, or enforces are known as the 'law of the land'; and the special group or class of persons concerned with the administration of them is known as 'jurists,' or, simply, 'lawyers.' But the laws with which they deal are very different from those of the theologian, the student of physical science, the physician, or the engineer. They have been defined as "rules of civil conduct enforced by the State"; and this chapter may conclude with a brief explanation of that famous definition.

As has been already suggested, 'State' and 'Nation' are closely allied but quite distinct terms. A nation is a group of people inhabiting a definite territory, which is marked off from other collections or groups of peoples by the fact that it owes its allegiance to a single Government, which claims to exercise a direct control over each individual in the group. This control is exercised in each case according to a more or less complicated system of rules known as the 'Constitution,' which is itself part of the law of the land. The machinery which this system 'constitutes' is known as 'the State'; and it goes on quite independently of deaths or other changes of the

persons who from time to time work it. Of course, therefore, the State has no objective or concrete existence, being merely an institution or piece of mental machinery constructed for certain purposes. Therefore it is illogical and confusing to use the terms 'State' and 'Nation' as though they were interchangeable.

One other point may be noted, to meet criticism. In these days of easy transport and complicated industrial and commercial arrangements, it is quite frequent for persons who owe allegiance to one Government to live in territory which is under the control of another Government. We call such persons in this country 'aliens.' Quite naturally, this condition of things sometimes raises delicate questions between the two Governments concerned; and what we call the Law of Nationality exists to define these relations. But this is a subject not properly so much for national (i.e. territorial) as for international law; and it is a matter for great regret that it is not settled by some international code, instead of being left for the national laws of the different Governments interested, which are, as a consequence, often so inconsistent as to cause great inconvenience, and even hardship, to the persons concerned. The point to notice is, however, that the alien is a part of the nation in whose territory he lives, at least to the extent that he must obey its laws, whilst he is there. He may not have all the rights and privileges of a citizen in his adopted country; but he is amenable to its courts of justice, at any rate unless, by the rules of international law or the provisions of a treaty between the Government to which he owes allegiance and that of the country of his adoption, it is provided otherwise. But such cases are rare in modern times.

Our definition also states that a law is a 'rule of conduct.' It is unnecessary to refer again to the implication of 'order' in the word 'rule'—that which is regular or straight—beyond pointing out that it includes very much more than what is usually understood by a 'command.' No doubt, some commands produce rules,

because the practice of obedience to them on a large scale results in that uniformity of conduct which, as we have seen, is closely related to the idea or concept of 'order.' But it includes, as we shall see when we come to deal with the sources of English Law, many compulsory influences on conduct which have never been expressed as commands at all. It may surprise non-legal readers to learn, for example, that the famous rule of primogeniture, by which the eldest son succeeded to his ancestor's estate on the latter's death without a will, was never formulated as a command by any English King or Parliament, though it governed the succession to the chief classes of landed property in England for at least six centuries. But it was undoubtedly a law.

Then it should be observed that such rules as the State enforces are rules of *conduct*, not of belief or judgment. The State is a machine singularly ill-fitted to deal with questions of belief ; and it is not the least of the advantage of its gradual emancipation from theological influences, that it has virtually ceased, in what is called modern civilization, to try to do so. That is not its business, which is to hold the balance even in dealing between one member of the nation and another, and to prevent one citizen encroaching upon the personality of other citizens, which he cannot do by merely holding a particular belief or opinion. But it should, of course, be noticed, that to hold beliefs and opinions is one thing ; to express them is another. The latter act is conduct, not merely belief ; and though, in some (perhaps most) cases, such conduct may be harmless, or even beneficial, yet in some few cases it may undoubtedly be harmful to individuals or the nation, and may therefore be controlled by the State.

Moreover, it need hardly be pointed out, that no State attempts to enforce *all* the rules which affect the conduct of its citizens. For example, it may be said to be a rule of conduct in most civilized communities that people should work during the light, and rest or sleep during the dark hours of the day, unless their occupations compel them to do otherwise. And there are, obviously, sound



reasons for this almost universal rule. Nevertheless, no State enforces it. Similarly with the rules against private drunkenness, debauchery, excessive gambling, and the like. The trouble is, however, that there is hardly any kind of conduct on the part of one member of so closely organized a body as the modern nation, which may not affect, for good or ill, his fellow-citizens. That is why it is so very difficult to place a satisfactory limit on State action ; so that one can hardly say that even the famous 'Prohibition' Amendment of the Constitution of the United States is unconstitutional, though we may think it unwise. But there is, undoubtedly, a strong feeling both among lawyers and laymen, that only certain kinds of conduct are the appropriate sphere of State control ; and this view was expressed by Blackstone, the great English jurist of the later eighteenth century, when he defined law not merely as a 'rule of conduct' but as a rule of '*civil* conduct.'

Finally, our definition requires that a rule of conduct, to be a law, must be enforced by the State. Observe, that it does not require that it should be imposed, or originated, by the State. In fact, especially in the case of English Law, it is historically demonstrable that a great deal of it was never consciously imposed by the State at all ; and the persistent and not always over-scrupulous efforts of the dominating school of English legal philosophers in the nineteenth century to prove the contrary, were more ingenious than edifying. It would, on the other hand, be quite plausible to maintain that English Law owes much of its stability, as well as much of its flexibility, to the fact that the State has not attempted to arrogate to itself the rôle of exclusive law-maker. It will, however, be sufficient to indicate, when we come to analyse the sources of English Law, the facts which render the older theory untenable.

As a last word, it may be pointed out, that the enforcement of law by the State may be either direct or indirect—in fact, of many degrees. In some cases, the State may say emphatically : "If you do such an act, you will be

put in prison.” That is the general attitude of what is termed the Criminal Law. But the State may simply say : “ If you do such an act, and your neighbour who has suffered in consequence chooses to appeal to us, we will make you pay him compensation.” Here, it will be seen, the State does not act unless requested by the injured party. This is what we call the Civil Law. Finally, the State may say : “ We do not expressly forbid such an act, e.g. driving on the wrong side of the road ; but, if you do it, and a collision occurs, we shall assume that you were the party to blame.” The result is, that the rule of driving on the side of the road deemed to be ‘ right ’ is enforced, though indirectly, by the State.



## CHAPTER II

### THE ORIGINS OF ENGLISH LAW

THE English, or Anglo-Saxons, were not the earliest settlers in the land which afterwards took their name. They reached the country, travelling in various kinds of shallow-draft keels, from the western borders of the northern mainland of Europe, in a long succession of migrations which lasted from the fifth century after Christ until the tenth. When they arrived, they were pure heathens, worshipping Scandinavian deities like Thor and Odin, and the spirits of half-mythical ancestors. Their different languages were, probably, dialects of a common stock; but it is very doubtful whether one group could always understand the language of another. They were, mostly, good fighters; for they included the more adventurous spirits from a land in which the struggle for life with stern Nature was perpetual, and where internecine feuds were indigenous. They probably knew more about sea-craft and fishing than any other race in Europe; but they also knew a good deal about the rearing of cattle and sheep and the practice of primitive agriculture. Probably it was their preference for these comparatively safe pursuits to the dangers and hardships of a fisherman's life, which brought the bulk of them to England, and intensified their grip on their new homes.

Britain, as the whole island had been known at least as far back as the days of Julius Caesar, the founder of the Roman Empire, was, at the arrival of the earlier English settlers, and for long after, peopled by a race which is supposed to have immigrated from a somewhat more southerly district of the mainland than that from which the English came, and, after an independent settlement of some two or three centuries, to have been conquered

by the Romans, and brought, more or less effectively, within the Roman system of government and civilization. Certain it is that many of them had reached a high stage of culture, possibly with too great rapidity for it to remain permanent after the artificial support of Rome was withdrawn. There was a semi-official Christianity, partly derived from the powerful Church of Gaul, and partly from the missionary efforts of Irish evangelists. The luxury of the Roman officials and settlers had spread to some extent among the people, and probably caused them to dislike the newly arrived English, not merely as strangers and heathen, but as barbarians. Whether the Britons themselves had found the island empty, or had had to overcome a still older race, or races, is uncertain ; but, if there are survivals of such *primaeval* races, too little is known about them to justify any inference as to their influence upon English institutions.

It is, however, a different matter when we address ourselves to the question : Are the so-called 'Anglo-Saxon Laws,' those oldest monuments of the English legal system, purely English, or a compound of the customs of the Englishman and the Romanized Briton ?

In the present state of our knowledge, it is impossible to give a dogmatic answer to this question. One can only point out the improbability of anything like fusion between the two races in these early centuries in which the outlines of the English system were drawn. Despite the untrustworthiness in detail of the legends and records of that time, we can realize (what all general considerations would also lead us to assume) that the period during which the English spread over the eastern and southern parts of Britain was a period of continuous and cruel fighting between invaders and invaded, which ended in the latter being cooped up in the western strip of land stretching from Strathclyde to Land's End, known till comparatively recent times as 'Wales,' the country of the 'stranger.' We know too that, whereas the English brought with them, as one of their central institutions, the stockaded village, surrounded by great arable open fields, worked

on a system of common ploughing, the Britons, more pastoralists than agriculturists, preferred the looser tribal type of settlement which suits large cattle-runs, in which a single homestead stands at a distance from its neighbours. Above all, there was the difference of religion; for, when the English were converted in the seventh and eighth centuries by missionaries from Rome, it was too late to alter the results of the previous centuries of storm and conflict.

Whether or not we are right in supposing that the so-called 'Laws of the Anglo-Saxons' represent purely English ideas, and are little influenced by British customs, it is possible to make one or two useful observations on the character of these 'Laws,' which have been subjected to a minute and careful editing by a distinguished German scholar, the late Dr. Felix Liebermann.<sup>1</sup> Their genuinely archaic character is a valuable suggestion of the long road which a system of Law has to travel before it reaches a condition in which it satisfies the needs of a civilized community.

It is one of the most striking features of the 'Anglo-Saxon Laws,' that they do not profess to deal with the whole of England, but only with certain parts of it, or rather, perhaps, with certain of the races or kindreds settled in it. There was, in fact, at the times when these Laws were recorded, no 'England' as we understand it, i.e. no single country under a single government, speaking a single language, and, in general, following the same law. And so we find, in the Anglo-Saxon Laws, groups of documents dealing with Kent or the Kentish men, others with Wessex or the West-Saxon men, others again with the Midlands or Mercia, the land of the Angles, who ultimately gave their name to the whole country. Not merely the rules, but even the language employed, differ in each case; and an expert linguist could tell, simply from the language employed, to what part of the country a particular 'law' belonged.

<sup>1</sup> Unfortunately for some English readers, this monumental work (*Gesetze der Angel-sachsen*, Halle, 1912) has not been translated.



But our knowledge of Old-English institutions reveals the fact that the 'Laws of the Anglo-Saxons,' valuable as they are for the understanding of the origins of English Law, give us anything but a complete picture of the social life of their day. They are fragmentary compilations, probably intended to deal only with matters in which some great event was bringing changes into the old ways of life, and thus causing disputes which, like most disputes in primitive society, were apt to end in violence and bloodshed. We must beware of assuming among the Englishmen of the seventh or eighth centuries after Christ that passion for voluminous State documents which distinguishes their descendants. The arts of reading and writing were rarely practised in those days; the printing press was undreamed of. Consequently, the process of recording laws or customs was painful and laborious, and was, apparently, reduced to a minimum. It is only by the invaluable evidence of the survival of institutions hardly so much as mentioned in the Anglo-Saxon Laws, that we realize, as by a flash, the prevalence of a state of what might, almost literally, be termed 'parochialism,' beside which the divisions into Wessex, Kent, and Mercia appear almost modern. The survival into quite recent times of the 'immemorial custom of the manor,' the existence of which was politely ignored by the King's Courts of Justice till nearly the end of the fifteenth century, and which actually survived as good local law in hundreds of country villages till a year or two ago, is a startling reminder of the intensely local character of primitive life. For the 'manor' was, in most cases, nothing more than the ancient township or village, which had been the typical unit of settlement from the days of the earliest English invasions, with a 'lord' imposed upon it by a later system of government. After all, there is nothing surprising in a primitive society being a strongly localized society; for in primitive society communication between different localities is immensely difficult. It is not very easy for people living under modern conditions to keep this fact in mind.

Two other points about the Anglo-Saxon Laws deserve a word of mention.

The first is, that, though these laws often (indeed usually) bear the names of kings and rulers, it must not be thought that they were deliberately invented and enacted, like a modern Act of Parliament, by the kings after whom they are named, or, indeed, by anybody else. Nowadays, if a Government or a group of members of Parliament makes up its mind that a rule of conduct ought, for some reason or another, to be enforced, it employs a skilled draftsman to put its desire into the form of specific injunctions intended to enforce that rule, whatever may have been the previous practice of the persons intended to be affected. If Parliament agrees, the projected 'Bill' is enacted in the name of the King, "by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same." This is what we call 'legislation,' or the passing of new laws. To the ordinary Englishman of the eighth or ninth century, such a process would have seemed blasphemous. He did not speculate much as to the origin of the rules of conduct which he followed. If he thought about it at all, he assumed that it had 'always been so'; and, if pressed very hard, he might have attributed the origin of such rules to one of the gods or long-dead heroes of his mythology. After the conversion of the English to Christianity, when the influence of the Roman Church began to make itself felt in the Anglo-Saxon Laws, and, undoubtedly, to influence them in the direction of change, the idea was still something the same. For the bishops never for a moment admitted that they were making changes out of their own heads. They were merely introducing the precepts of the Supreme Law-giver, which had previously been hidden from heathen eyes. Occasionally, in the later Anglo-Saxon Laws, we find an exceptionally powerful king writing of changes which he or his father has made; and these occasions contain a significant hint as to the future of Law. But, for the most part, the Anglo-Saxon



Laws profess to be nothing more than the 'settling,' 'fastening,' or 'securing,' by the written record, of the ancient customs. At the very least it can be said that, everywhere, the Laws of the Old English assume the existence of a mass of immemorially old, unalterable, spontaneously observed rules or practices, which no man created and no man might alter. It may, perhaps, be added, that this belief has never entirely disappeared in England, and that it explains much in English legal history.

The last thing we may note about the Anglo-Saxon Laws is, that they ignore entirely many differences of classification and treatment which to modern lawyers seem obvious. The sharp distinctions of modern jurisprudence—substantive law and procedure, criminal and civil law, public and private law, and the like—are quite absent from them. Even the more obvious distinction between ecclesiastical and secular affairs is absent; one gets rules as to the observation of Lent next to rules about burglary and trespass, and rules about stealing mixed up with rules about privileges of the clergy. We know that, in some vague way, the existence of proprietary rights was recognized; because there was, obviously, a law of theft, and theft implies property which can be stolen. But most of the rules about the use of land, which we would give so much to know, are assumed rather than stated. We infer them from the denunciation of house-breach (*ham-socn*) and such like offences; but we cannot be sure that the object of these rules is not to protect life rather than property. All this is typical of archaic law.

### THE NORMAN CONQUEST

At one time it was the fashion to assume that the victory of William of Normandy at Senlac in 1066 was the beginning of English legal history. That assumption is so grossly inconsistent with facts, that the reaction

against it has been excessive ; and there is now rather a tendency to assume that the Norman Conquest was an unimportant incident in the development of English Law. That assumption is, if possible, more unfounded than its predecessor.

The Norman adventurers, military and 'clerical' (as civilians were called in those days), who settled upon England in the eleventh century, were certainly no altruistic missionaries, desiring to sacrifice their lives for the good of their adopted country. They themselves would have scorned such a suggestion. Plunder, in one form or another, was their avowed object. If, however, they were robbers, they were intelligent and systematic robbers, who were far too wise to sacrifice a steady and assured income to the mad impulses of destruction. Their civilians, or clerks, showed a genius for order and method. They loved documents and records almost as much as the English hated them. We know far more of the England before the Conquest from their records than we could possibly discover from contemporary sources. Many of them were, unquestionably, corrupt ; but their own system of records facilitated their discovery and conviction. The military adventurers had fewer virtues. They were cruel, oppressive, and quarrelsome. Fortunately, both classes had over them a master of quite exceptional political genius, who, young as he was, saw the dangers of the situation, and determined to avert them. He could not, of course, refuse to acknowledge the right of his barons, implicit in the morality of the time, to take handsome toll of the country which their arms had won. But he determined that they should not, by their exactions or oppressions, drive the native peasantry to revolt or despair, and thus destroy the fruits of his conquest, nor, by their private wars with one another, lay waste the country with fire and sword.

An impulsive or merely brutal monarch would have trusted to occasional outbursts of ferocity to keep his turbulent followers in order. William and his successors (notably his son Henry and his great-grandson of the same

name) did much more than this. On the one hand, they rapidly set up an elaborate system of courts of justice, both central and local (the 'Bench,' the 'Exchequer,' and the 'eyres' or circuit courts), to enforce the royal rights against the royal vassals; and these courts ultimately (though only after a long struggle) became a complete machinery, not only for enforcing the 'pleas of the Crown,' but also (which was equally important) for deciding the 'common pleas' or pleas of the people. Moreover, they carefully revived and enforced the ancient and somewhat primitive English institutions—the courts of the hundred and the shire, and the 'fyrd,' or local defence force. But, perhaps most important of all for our immediate purpose, William, on more than one occasion, both orally and in writing, promised to the English as a whole, and to important groups of them like the citizens of London in particular, their 'law,' i.e., as he explained more than once, the rights which they held "on the day when King Edward (the Confessor) was alive and dead." It may be said by sceptics that these were vague and rhetorical promises, never intended to mean anything. We have no right to make that assumption. Vagueness or indifference to charter-rights were not Norman weaknesses. Rather the danger came from subtle twistings of words to new meanings, or from ruthless exactions of conditions little understood when the promises were given. But the whole course of English legal history shows that William meant what he said when he promised the English their 'law,' and that he thus enabled the peasant, even in his lord's own court, to protest, with the support of the 'homage' of his neighbours, that he, though a serf, was by no means a rightless slave, but a man who had been guaranteed his 'law' by the monarch of whom that lord was a vassal. Thus, after a period of stern discipline, during which his ancient share in the village lands and liabilities to the common service had been converted into labour-dues and compulsory residence on the lord's domain, the peasants, the vast mass of the English population, burst their chains and escaped from



serfdom, making the language of the country and its literature once more native English and not Norman-French, England once more England and not a province of Normandy, and the Law of England once more English and not Norman or Roman.

Indeed, in one very remarkable way, the Norman Conquest added immensely to the strength of English Law. The weakness of the older state of things had been, as has been already pointed out, that there was not one English Law throughout the land, but many English customs varying from place to place. This was a state of affairs intolerable to the orderly and methodical Norman officials who had set up the great system of royal courts of justice to which we have alluded. That system was, in essentials, complete by the middle of the thirteenth century; and, almost immediately, there followed the rapid carrying-through of a process which was essential to the national unity, but which was not accomplished in the other countries of Western Europe until centuries later—to wit, the making of a ‘common law’ for the whole land, from Tweed to Channel.

How this important change was brought about is still one of the mysteries of English legal history. Unquestionably it was closely connected with the system of ‘eyres’ or periodical circuits of the King’s judges throughout the shires, which took definite shape in the reign of Henry II. Originally more financial than legal, these circuits assumed more and more a judicial character; and the introduction, in the twelfth and thirteenth centuries, of the jury-system, by which sworn bodies of local neighbours informed the King’s representatives of the circumstances of a dispute, and gave their true answers (‘verdicts’) to questions put to them by the same officials, afforded the King’s judges an unrivalled opportunity of learning of local customs. This system, which was by no means (as commonly supposed) a native institution, but a foreign introduction, was for long bitterly disliked by the English, and only, to the last, exercised by the Royal judges. But, used regularly on the judicial eyres,

it must have had the effect of bringing to the minds of those judges, with unrivalled completeness, a knowledge of the infinitely varying local customs of the realm. The judges might, no doubt, have continued to enforce these local customs, each in its own locality ; but such a course was, naturally, abhorrent to the representatives of a central government, which desired uniformity of administration. And so, in some way which cannot exactly be discovered, the King's judges, in their periodical meetings in London between the circuits, to hear cases in the King's central Courts (the Benches and the Exchequer) at Westminster, seem to have agreed among themselves upon a process of fusion of the various local customs into a common or unified system, applicable throughout the country. The rules of this system they applied to the decision of cases heard in the tribunals at Westminster ; and, very naturally, they applied the same rules when acting as royal commissioners or judges on circuit. Thus arose the famous division of labour between judge and jury—the judge declares the law, the jury finds the facts—which to this day regulates the course of justice in England.

### THE COMMON LAW

Thus the country acquired a 'common law' which, it is true, is 'judge-made law,' in the sense that it was put into shape and authoritatively laid down by judges, but is of native or popular growth in the sense that its materials were drawn from the actual customs and practices of the people. Thus, on the one hand, our first great exposition of the Common Law is from the hand of a judge, the famous Henry of Bratton or Bracton, who was a judge of the King's Bench and a justice on circuit during the middle years of the thirteenth century. But, on the other, Bracton himself, in the title of his work (*Concerning the Laws and Customs of England*), acknowledged that custom was at least one of the sources of his inspiration ; and the long-accepted definition of the Common Law as



"the universal custom of the realm" is an unconscious testimony to the same view.

But one important reservation must be made from the conclusion that the Common Law is English in origin. There was, undoubtedly, one very radical change effected in the Law of England by the introduction of the feudal form of landownership. Though there are signs that something of the kind had been maturing in England before the Norman Conquest, these signs are little more than hints as to future changes. It is one of the curiosities of legal history that, while feudalism as a form of government broke down sooner in England than anywhere else in Western Europe, its influence as a system of landownership was more thorough and more enduring here than elsewhere. Put quite shortly, the essence of feudalism is that the King, the head of the feudal pyramid, delegates to a somewhat limited circle of adherents, usually warriors, the government of certain districts, or 'fiefs,' that these warriors, the 'tenants-in-chief,' sub-delegate parts of their districts to under-tenants or vassals, and these again to theirs—the numbers in each rank increasing but their individual fiefs diminishing—until at last the lowest rank, the holder of a single 'manor,' is brought into direct contact with the tillers of the soil. These he regards as *his* tenants, though in fact they had never, in many cases, received any grant of land from him at all, but had, probably, in many cases, they and their ancestors, been settled on the land for ages before the new system was introduced.

Of course in no actual case was the system ever so precisely symmetrical as this brief account would suggest. There was too much human nature in it to allow of mathematical accuracy. But it had sufficient uniformity to give rise to a body of doctrine, embodied in certain more or less authoritative treatises, which entitles us to speak of 'feudalism' as a system of government which at one period was more or less uniform in the whole of Western Europe, including even certain parts of Italy. Owing to the circumstances of the Norman Conquest, it was introduced into England with peculiar completeness, as is

shown by that unrivalled picture of the land settlement of England at the end of the eleventh century known as Domesday Book. And though, as we have said, the governing powers of the feudal lords were kept in hand more thoroughly and completely by the strong Anglo-Norman monarchy than by other European rulers, yet, perhaps for that very reason, the rights of the feudal landowners over their vassals and peasants came to be looked on more as rights of property than rights of rulership, and the fief, or feudal district, to be regarded as the 'estate' or 'domain' of the feudal lord. Thus, as has been said, feudalism in England, though it soon ceased to be a system of government, contributed to English Law that important branch of the subject known as Land Law. It is certainly not of English origin; but, having been treated as uniform throughout England, being administered and formulated by the same Courts and in much the same way as the old English Law, it certainly forms, or did form, part of the Common Law. Many of its characteristic features were abolished at the Restoration in 1660. Most of the remainder have been abolished by very recent legislation. Yet it is true to say that its fundamental principles still dominate, to a substantial extent, English Land Law.

Other legal systems have had a different but appreciable influence upon the formation of English Law, and may be said to be amongst its 'origins,' though they form no part of the Common Law as generally understood.

### THE CANON LAW

Historically speaking, the oldest of these is the Canon Law of the Western Christian Church. We have already seen that the English, unlike the earlier Britons, were evangelized directly by missionaries sent from Rome; and we have noted the influence of bishops even in the old Anglo-Saxon Laws. But the Canon Law, in those early centuries, was itself in a very rudimentary state, and was

hardly a definite body of rules separated from other obligatory rules of conduct. It had, however, the advantage of a specially trained body of men, representing the highest level of intellectual training then known, to push its tenets and advance its claims; and it had the supreme advantage of being administered, in the last resort, by the bishops of the Imperial City of Rome, who, in the disturbances which followed the downfall of the Roman Empire, had succeeded to much of the authority of the defunct Emperors, to which they added a special sanctity as the admitted rulers, in spiritual matters, of Western Christendom. Owing to the dismembered political condition of Italy, they were there actually great territorial potentates. But their chief authority was due to the fact that they claimed, not equality with, but superiority to, all earthly monarchs, in all matters which could, by ingenious argument, be termed 'spiritual.' Their claims were often contested in detail, by the monarchs who disliked interference in the government of their kingdoms; but, broadly speaking, until the religious Reformation in the sixteenth century, no ruler seriously denied the validity of Papal jurisdiction in such matters as orthodoxy in belief and worship, the correction of morals, the discipline of the clergy, the validity of marriages, the fitness of applicants for benefices, the legitimacy of offspring, and even the, to us, purely secular subjects of the making of wills of chattels and the distribution of the goods of deceased persons.

These claims were put forward, with increasing energy and ability, by a series of able Popes in the eleventh century, just before William's conquest of England was undertaken; and it is noteworthy that William (doubtless with some reluctance) paid for the sanction of the Papal blessing on his enterprise, with a definite promise to allow the establishment of a separate system of ecclesiastical courts in England if it succeeded. This promise he faithfully redeemed by the famous decree by which he ordained that "whoever should be accused of any offence against the 'episcopal laws' should come to the place which the



bishop should appoint and there answer for his offence; and not according to the [custom of the] hundred (i.e. the secular tribunal), but according to the canons and 'episcopal laws,' do right to God and his bishop."

The consequence of this step was a rapid organization in England alongside of the Courts of the King (which administered the Common Law), and the feudal Courts (which enforced the local customs of the fief), of a complete organization of Ecclesiastical Courts, which applied the Law of the Church, or the Canon Law. From the humble tribunal of the archdeacon, to the greater Court of the Bishop, and the still higher Court of the Archbishop, finally to the august tribunal of the Pope himself, an ecclesiastical suit might take its weary way. All these Courts had their own judges, with a multitude of minor officials, down to the 'sompnour' or summoner, who is a familiar feature in mediaeval literature. The rapid development of the Canon Law, largely on the model of the Roman Law (part of which it incorporated) in the centuries between the Norman Conquest and the Reformation, gave a dignity and efficiency to the 'Court Christian' (as the ecclesiastical tribunals were called) which not only made them a very real influence upon the lives of clergy and laity, but aroused the jealousy of the secular judges. Quarrels between the two jurisdictions were frequent. One of the most famous is that of Henry II and Archbishop Thomas à Becket, in the twelfth century, which turned very largely on this subject. In England, owing to various causes, the Royal Courts kept the Church Courts pretty well in hand; but, as has been said, the latter exercised unquestioned authority in many matters of law, even after the famous repudiation of Papal authority in the sixteenth century. It was, indeed, rather the Civil War of the seventeenth century than the Reformation of the sixteenth which broke their power; and, even after that, they still continued to exercise authority till the middle of the nineteenth century. Then, in the year 1857, the two most important subjects left to them (the 'probate' or authentication of wills and the administra-

tion of a deceased person's movable property, and the matrimonial jurisdiction) were definitely transferred from them by Act of Parliament to the King's Courts. Though certain changes of importance were then made, not merely in the jurisdiction but in the law affecting those two subjects, yet the bulk of the rules with regard to them which the Church Courts applied were taken over by the new tribunals, and must therefore be counted among the sources from which modern English Law is derived.

### THE LAW MERCHANT

One other body of law which was not of native origin may be said to have contributed substantially to the sources of English Law. This is the Law Merchant, the general body of usages which grew up amongst persons engaged in the carrying trade of Europe, whether by land or sea, for the regulation of differences and disputes between one another. Behind this body of usages lay, no doubt, the Law of the old Roman Empire, whose fall had reduced Western Europe to confusion. But, just because that Empire had fallen, its elaborate body of rules, the *Corpus Juris Civilis*, had ceased to have legal force, even in the countries which had once formed part of the Roman Empire; and its influence became singularly like that of the local customs which it had originally replaced. It was known as the 'Common Law' of Western Europe; because, in fact, in the greater part of that area the people had at one time lived under it, and so it was to them a tradition, though, oddly enough, whereas true customary law is unwritten, the Roman Law was known as the 'droit écrit' or written-law, in the countries in which it was received.

But, though the Roman Law may have been the foundation of the Law Merchant, yet the gradual supersession of the old caravan routes of the Early Middle Ages by the development of the Mediterranean and Atlantic sea routes, the increase of shipping in the Baltic, and,



finally, the opening-up of the great ocean routes in the fifteenth and sixteenth centuries, gave an ever-increasing opportunity for the development of new customary law to deal with the new trade conditions; and new codes, such as the *Consolato del Mare* for the Mediterranean, the Laws of Wisby for the Baltic, and the Laws of Oléron for the Atlantic coastal trade, show the increasingly maritime character of the newer Law Merchant.

It was vital to the merchants that they should have some such body of universal rules to protect them from the arbitrary and unfriendly treatment which they would otherwise be likely to receive in the national tribunals of the countries to which they resorted for business purposes. Most of their lives being passed in strange countries, they knew well the dangers to which the jealousy and hatred of foreigners would expose them, unless they could appeal to special tribunals of their own, which would administer known and universally acknowledged rules of commerce. Hence they refused to visit a foreign town unless the burgesses would establish there a 'Court Merchant,' in which, as a statute of the English Parliament of 1353 puts it, their affairs would be disposed of "by the Law Merchant in all matters touching the staple, and not according to the Common Law." These Courts were specially connected in many cases with the holding of fairs and markets; and their transitory character and the necessity for haste in the transaction of their business are implied in the name commonly given to them in England, viz. 'courts of pie-powders' (*pieds poudrés*), from the dusty feet of the strangers who attended them. It was, indeed, admitted (again by the English Parliament) in the year 1477, that "to every one of the same fairs is of right pertaining a court of pie-powders."

For centuries, then, the Common Law Courts suffered the existence of these quasi-foreign tribunals in their midst; and the law which the latter administered could hardly be said to be part of English Law. But the growing insistence of the State on absorbing the whole business of administering justice in the land, so clearly manifested

in the destruction of the feudal courts and the emasculation of the Church Courts, ultimately extended also to the Courts of the Law Merchant. The way towards the absorption of the alien jurisdiction was pointed out by the publication, at the beginning of the seventeenth century, of Malynes' great work, *Lex Mercatoria*, which made plain to all lawyers the nature of such hitherto secret mysteries as bills of exchange and lading, letters of credit, charter-parties, insurance policies, rules of averaging loss, transactions like bottomry and respondentia bonds, partnerships, trade-marks, salvage claims, and so forth. The political troubles of the later seventeenth century, and the conservative reaction which followed them, delayed for generations the adoption of the step foreshadowed by Malynes; but at last, in the person of the great Lord Mansfield, the King's Courts found a judge with sufficient enthusiasm for his profession, and a sufficiently philosophic mind, to undertake the great task of absorbing into the Common Law such of the rules of the Law Merchant as should be deemed consistent with the fundamental principles of English Law. It is impossible here to explain the technical reasons why Lord Mansfield was able to do what his predecessors (even such great men as Sir Matthew Hale and Sir John Holt) had been unable to effect, or the methods by which he did it. Suffice it to say that, by the end of the eighteenth century (Lord Mansfield died in 1793), commercial transactions had ceased to be outside the purview of the King's Courts, while the old anomalous local tribunals which had dealt with them for centuries had, except in some instances such as the Liverpool Court of Passage and the Bristol Tolzy Court, largely disappeared. It is true that the jurisdiction in maritime matters was, and is still, shared between the Common Law Courts and the Court of the Admiralty. But the latter was also a King's Court, part of the national system of judicature; and the rules which it administered, though largely of foreign origin, are now unquestionably part of English Law.

## CHAPTER III

### THE FORMS OF ENGLISH LAW

#### 1. JUDICIARY LAW

IN English Law at the present day, a rule of conduct enforced by the State assumes in almost all instances one of two forms, viz. the decisions or judgments of a judge or judges, and the enactment of a statute. In certain cases, no doubt, perhaps many cases, a rule which a statute attempts to lay down may be incapable of practical application till it has been explained by a judge or judges; and so the rule may, in effect, involve a combination of the two forms. But the two elements in the combined form will be easily separable, and will be interpreted and applied in different ways.

Historically speaking, the judiciary form is the older of the two. Long before any statute law had come into existence, other than the scanty ordinances of the kings who reigned during the first two centuries after the Norman Conquest, the King's judges, in their Courts at Westminster, and in their 'eyres' or circuits of the shires, had been giving judgments and laying down rules which were recorded on the carefully kept Rolls of the various Courts. And as, when different elements combine to form a single system, the older elements usually fix its general character, we may begin with the judiciary form of law.

The most striking peculiarity of this form is, that it combines in one effort two stages which, in theory, and (in the case of statute law) in practice, are quite separate. According to the principles of scientific jurisprudence, a rule which people are called upon to obey, on pain of some disagreeable consequence if they fail, ought first to be clearly and plainly stated, and then enforced against



those who contravene it. In theory, at least, the alleged culprit must have been made aware of the rule, before he is punished for breaking it. The principle is quite sound ; but, in human affairs, it is difficult to apply scientific principles with completeness. And it is especially difficult to do so in an early stage of society, when the machinery of legislation is undeveloped.

Accordingly, when, as we have seen, the King's judges in England set out, in the second half of the twelfth century, on their task of administering justice to the lieges, they found no formal statement of the rules which they were to apply. Parliament had not yet come into existence ; Parliament is at least a century younger than the regular establishment of the King's Courts of Justice. So there was no Statute Book to guide them. From time to time, a theory crops up that the King's judges of the twelfth and thirteenth centuries regarded the Roman Law, the *Corpus Juris Civilis*, as their source of inspiration ; and there can be little doubt that the Roman Law, of the study of which there was a great revival going on in the newly-founded Universities of Western Europe almost at the very time at which the English judges set out on their historic task, had a good deal of indirect influence on the formation of English Law. To it the Common Law probably owes one of its most striking characteristics—its individualism. Both systems look at society rather as a collection of individual units, each guaranteed a definite, if limited, sphere of action, and entitled to complain if anyone intrudes upon it, than as a single unity, in which individual interests must be subordinate to the common good. In this respect, the Common Law is in striking contrast with the older state of society which existed among the English before they had been disciplined by the Norman system. But, for all that, the King's judges in the twelfth and thirteenth centuries made no attempt, happily, to apply (as was done in many other European countries) the actual rules of the *Corpus Juris Civilis* to the England of their day, but rather, as has been said in the preceding chapter, succeeded in weaving together out of the various

customs of the country a single garment, the Common Law, which should serve to clothe all the nation. This they did, not by agreeing to publish any formal and complete statement of it, but, as each case arose, by first hearing the facts, then getting them confirmed by the jury, and then pronouncing which of the parties to a dispute had violated the custom applicable, or, if the Crown were a party to the proceedings, whether the accused had been guilty of the offence with which he was charged.

It is evident that, in a proceeding of this kind, the most prominent features would be, not any elaborate explanation of legal principles, but the accusation by the Crown or the plaintiff, the circumstances of the alleged offence, the behaviour of the witnesses, the verdict of the jury, and the pronouncing of judgment and sentence. Only by an unconscious process of inference would the bystanders realize that, before he was found guilty, the accused must be proved to have violated some rule of conduct of which the judge was the champion and defender. But the process would be easy if, as is assumed, the rule in question really agreed with the already established morality of the community. Where that fact was not plain, it was, apparently, from the earliest times, the practice of the King's judges to expound the rule which the accused was alleged to have broken; and thus the practice grew up of looking for the law of the case, not in the dry record of the Plea Rolls of the Court, which merely stated the names of the parties, the allegations and denials, and the result of the trial, but in the words used by the judge in delivering judgment or directing the jury, which are reproduced in the published Reports of the cases.

Thus, it will be seen, the two essentially distinct processes of enunciating the rule and applying it against an offender, were, as has been said, combined in a single effort. That is the essence of judiciary law; and it has often been objected, that the mere statement of this fact is enough to condemn all judiciary law as unjust. But, if our view of the origin of judiciary law in England is correct, this objection largely fails; because, in this



view, the Judge is only enunciating a rule already known to the offender by the experience of every-day life. Nevertheless, the objection does, to a certain extent, limit the usefulness of judiciary law.

Let us turn, however, from this essential characteristic to some of the other features of judiciary law.

Another criticism that has been levelled against judiciary law is that it is arbitrary, i.e. dependent on the individual knowledge, convictions, or inclinations of each judge, and thus violates the fundamental principle of uniformity which characterizes all good law. If this criticism were sound, it would indeed be a grave indictment of judiciary law. In fact, according to the well-established practice of centuries, and the observance of the great doctrine of judicial precedent, it has little force in the case of English Law.

It is doubtless true that, in the earliest days of the King's Courts, there would be comparatively little likelihood of a judge's words travelling far beyond the place in which he held his court; though, in all probability, they would be well-known and remembered in the immediate neighbourhood, for a 'court day' has, from time immemorial, been one of the great rivals of the fair or pageant in the attracting of crowds. But we have to remember that the King's judges of the twelfth and thirteenth centuries were a small and closely intimate body of men, in all probability actually living together during their sittings in London, and certainly in very frequent touch with one another. It was clearly to their interest, as we have said, that the law which they professed to administer should be uniform; and it is hardly fantastic to imagine that, at their gatherings at Westminster or Serjeants' Inn, much of their conversation would consist of 'reports' to one another of decisions given in circuit or on the 'Benches' at Westminster.

Then, at as early a date as the last years of the thirteenth century (1285), some unknown persons began the practice of noting down the arguments of the pleaders and the rulings of the judges in the King's Courts, both

on circuit and at Westminster, and circulating their notes for the benefit of members of the newly formed legal profession. Obviously, in the days when printing was unknown, the circulation of these notes must have been very limited; but the demand for them was so great, that it gradually gave rise to a small profession of 'reporters,' whose notes, bound up together in annual parchment volumes, known as 'Year Books,' became an essential part of English legal literature, because they furnished the serjeant or pleader with an invaluable armoury from which to draw weapons for his forensic battles. Pleading before a judge who already admitted the principle of uniformity in the law, what more effective than to quote to him, in support of your case, a judgment by one of his colleagues, or, better still, himself, which appeared to favour your client? Your opponent would reply with a quotation from another judgment, tending to show a contrary view; and the 'argument from analogy' would begin, each side trying to show that its view of the law was supported by the weight of judicial authority. After the invention of printing, the anonymous collections of the Year Books, got together no one quite knew how, were succeeded by printed volumes bearing their authors' names, in which a statement of the facts of the case, the names of the advocates or barristers engaged in it, and a summary (more or less brief) of their arguments, are followed by the names and very words of the judge or judges hearing it. Owing to the invention of shorthand, the accuracy and completeness of reproduction are now enormously greater than they could have been in the old Year Book days. Moreover, though the profession of law reporting is open to all comers, its standard has been greatly improved in the last century, by the establishment of certain well-known organizations, public or private, which maintain regular staffs of skilled reporters, and editors to select and co-ordinate their reports, with a view to avoid overlapping and repetition. It is needless to say that, in these days of legislative activity, the judges and advocates engaged in a case frequently have to refer

to statutes, Parliamentary or other. But it is a safe prophecy that the reader who picks up a volume, even of modern Law Reports, will find that both judges and advocates devote the major part of their attention to the consideration of previously reported cases.

This, then, in simple words, is the doctrine of judicial precedent, which keeps judiciary law from arbitrariness. If once it be established, in the hearing of a case, that a Court of equal or superior authority has previously, as a necessary process in the chain of its reasoning, expressed an opinion on a point of law, and acted upon it in its decision, then the Court which is hearing the case must, in coming to its decision, follow that opinion, unless the latter has, since its delivery, been overruled by a higher tribunal or by Parliamentary legislation. Of course the doctrine is not quite so simple as it sounds, for all kinds of secondary considerations come in to complicate it, so that the art of putting case against case is one which often demands the highest forensic skill. But it should be particularly noted that mere *obiter dicta*, as they are called, or expressions of opinion not really necessary to the decision of the trial during which they are uttered, are not binding as precedents, though they may be referred to for guidance. Thus judiciary law, so far from being arbitrary, is, on the contrary, rather inclined to rigidity or continuity, because, in form at least, it confines itself to declaring law instead of making it. It represents, as has been already said, that element of order or uniformity, which is one of the fundamental elements in the conception of law.

English judiciary law is said to be derived from three sources, two of which have been before referred to, while a third has been reserved as more suitable for later explanation. These are (1) the Common Law, in the original sense of the expression, (2) certain foreign systems of law which are recognized as having, within narrow limits, authority in this country, and (3) Equity, a name given to a body of doctrine having a curious history, and occupying an anomalous place in the theory of English Law.



(1) Concerning the Common Law little more remains to be said. It was not only the earliest kind of judiciary law, but, as we have seen, it came into existence, or at least recognition, through judiciary action. We may confine ourselves, therefore, in this place, to the mention of one highly important but little noticed feature of its position, and to a brief indication of those legal subjects which it covers with its rules.

The highly important feature alluded to is the *completeness*, in theory, of the Common Law. In theory, it fills up all gaps in the legal system of England. No judge can turn away a suitor on the ground that the law makes no provision for his case. He must give judgment in every actual dispute in which it is demanded in due form. Of course this does not mean that every claimant with a grievance will get a remedy ; but it does mean that the Court cannot say : " The Law has not foreseen your case." Other systems frankly admit such a possibility, and usually direct the judges what to do if it occurs—e.g. to act on their own views of what is right, or according to the general principles of justice, or the like. The English judge has no such commission ; he is to do right (i.e. dispense law) to all manner of people.

What happens then if, in fact, no statute or recorded decision appears to cover the point in issue ? The answer is : that the Common Law must contain a solution if only it is thoroughly interrogated. And so, by the same process of analogy (or likeness) and comparison by which he handles all judicial precedent, the judge draws from the decided cases nearest in their circumstances to that before him, an inference as to what the decision of his predecessors would have been had the case been before them. This is, undoubtedly, a process from which the individual qualities of the judge who performs it cannot be eliminated ; and it is in such cases that the judges do, in a sense, undoubtedly make as well as declare the law. But it is law-making on strictly limited and cautious lines ; and it is extremely useful in adapting the law to new conditions in cases in which, for any reason, the more

drastic action of Parliament is unsuitable or unprocurable. This practice, in effect, gives to the Common Law that flexibility which is one of its best features. But it is not suitable for grave departures from admitted principles, even when such principles appear to cause injustice. That is a matter for Parliament.

But when it is said that the Common Law is complete, it must not for a moment be supposed that it is *exclusive*, i.e. that a rule of the Common Law overrides all other kinds of law. That is very far from true. All Acts of Parliament, for example, clearly override inconsistent rules of the Common Law ; so also do Orders in Council dependent on Parliamentary or Prerogative authority, though it has more than once been a matter of dispute how far Prerogative authority extends. Even local or trade custom may override the Common Law in matters to which such customs are properly applicable. The Common Law is the most yielding, as well as the most comprehensive, of the forms of English Law.

It is not unreasonable that a considerable space should have been devoted, in a work like the present, to the Common Law ; for, in spite of the appearance of later rivals, and particularly the ubiquitous activity of Parliament, the Common Law still furnishes the rules for a large part of the subjects with which English Law concerns itself. It is true that, in the important subjects of Land Law and Criminal Law, where the Common Law long reigned supreme, it has been largely, though (as we shall later see) not entirely, superseded in recent years by Parliamentary statute. But as regards movable property, at any rate the older forms of it, much of the law has never been embodied in statutes, and is still to be found by a study of the Common Law. Much of the most important part of the law relating to the Prerogative of the Crown, the rights of the subject against the Executive authority, and what is known as 'Constitutional Law' generally, can only be understood by a reference to the Common Law. The Common Law furnishes a good three-quarters of the rules which regulate the immensely



important subject of the making, interpretation, and enforcement of contracts. Finally, the Law of Torts, as it is called, i.e. the law providing civil remedies for such offences as trespass, whether to person, land, or chattels, for defamation, for improper dealings with other people's property, for abuse of legal process, and such matters, is, like the Law of Contract, very largely dependent on Common Law rules which have never been embodied in statutes.

(2) It has already been admitted that, in spite of the thoroughly native character of English Law, certain foreign systems have had a certain amount of influence upon its development. Inasmuch as two, at least, of these foreign systems, the Roman Law and the Canon Law, are written law, in the sense that they are embodied in certain well-known documents which are supposed to contain a complete and exact statement of them, it may seem curious to place them among the sources of judiciary law. And even the Law Merchant, though it was never embodied in a single authoritative code, yet comprised, as we have seen, certain important documents which might not unfairly be classed as statutes or formal enactments of law. Yet there is a general concurrence of opinion, that it is only by virtue of judicial recognition or Parliamentary enactment that any part of these two systems can be said to have been incorporated into English Law. The reason probably is, that, at any rate for the last four centuries, both Parliament and the Law Courts have been unwilling to admit that these foreign systems have any inherent force in England. They are here, as it were, on sufferance, and to a limited extent ; that extent to be determined by Parliament or the Law Courts. It is true that, according to a theory which was popular half a century ago, the Canon Law of the Western Church was, even before the Reformation, not regarded as wholly binding on the ecclesiastical courts in England, but only to the extent to which it was 'received' or acknowledged by courts in England. This theory has, no doubt, been subjected to such severe criticism that it must now

be regarded as exploded. It is, however, quite certain that, since the Reformation, the position has been clear. For the Act of Parliament which permitted the Canon Law existing before the Reformation<sup>1</sup> to remain in force until a contemplated revision (which, in fact, has never taken place) should be effected, qualified the permission by the significant words that it should only be in so far as the Canon Law was not "repugnant, contrariant, or derogatory to the Laws or Statutes of the Realm, nor to the prerogatives of the Regal Crown of the same or any of them." And it is obvious that such a vague permission requires judicial interpretation before it can safely be acted upon. Similarly, it is clear that the limited amount of Roman Law which has crept into English Law by way of the jurisdiction in wills and intestacies, is such, and such only, as has been adopted from the Roman Law by English judges. And so of the Law Merchant, as incorporated into English Law in the eighteenth and nineteenth centuries. Even the great Lord Mansfield, warm admirer as he was of the Law Merchant, did not venture to disturb the long-settled (and rather inconvenient) rule of English Law, that the property in goods may pass on a sale, without delivery or even payment of the price; though this rule is contrary to the Law Merchant.

It is, therefore, not only possible, but, for practical purposes, inevitable, to class Canon Law, Roman Law, and the Law Merchant, in so far as they are part of English Law at all, as judiciary law; because, though an advocate, on the hearing of a case, might refer to a Canon of Pope Gregory, or a decree of the Emperor Hadrian, in support of his views, he would find little favour with the judge unless he could show that the passage had already received application by the English Courts, while, if his opponent could quote a decision of an English court inconsistent with the passage, the latter would have no force at all.

<sup>1</sup> Of course the only Canon Law enacted since the Reformation which has any legal force in England at all is that enacted by the Convocations of Canterbury and York, acting under 'Letters of Business' from the King.

(3) Equity, the third of the three great sources of judiciary law, requires a rather more elaborate explanation; for, as has been suggested above, its position is both curious and anomalous. Most unquestionably, its principles are judiciary; they have never been laid down by statute, though Acts of Parliament have, both expressly and by implication, recognized their existence. Yet they were largely evolved, not merely to supplement the deficiencies, but to mitigate the application, of other judiciary law, and, what is more, the judiciary law of judges who derived their authority from the same monarch as did the Equity judges themselves.

The only way by which to understand the position is to glance at its history. Briefly speaking, the process, previously described, of welding together the old local customs into a Common Law, was effected by means of a document called a 'writ' (*breve*), or (to distinguish it from the many other kinds of writs) a Writ Original (*breve originale*). When the judges were agreed that a general rule of law could be derived from the multitude of particular customs, they let it be known that a writ summoning a person alleged to have broken such rule to appear before them at Westminster, would be issued by the Royal Chancery for a fixed fee. A very considerable number of such writs were introduced during the twelfth and thirteenth centuries; and they, in effect, amounted to a curiously indirect but very authoritative statement of the Common Law. The little treatise attributed to Glanville, the great Justiciar of King Henry II, which is the earliest text-book of the Common Law, is entirely a commentary on these writs. Glanville lived in the second half of the twelfth century. Bracton, who wrote somewhere about the middle of the thirteenth, is also full of information about them, more particularly as showing that new varieties of writs were from time to time introduced to meet changing circumstances. He actually gives us the names of the judges who invented, or are supposed to have invented, certain writs. Thus, though there does not appear to have been any authoritative



collection of forms, the Register of Writs (*Registrum Brevium*) was a collection of legal remedies, continually expanding, which could be obtained from the King, in whose name they were issued, by persons aggrieved by breaches of the Common Law. It was the Dictionary of the Common Law.

Towards the end of the thirteenth century, apparently, the inventiveness of the judges began to dry up. Few new kinds of writs were invented by them; and if the Chancellor, the head of the Royal Chancery whence the writs issued, ventured to issue new ones on his own authority, the judges before whom they came 'quashed' them, i.e. refused to enforce them. All great institutions have their periods of vigour and decline; and it may have been that the great race of judges from Glanville to Bracton, who formulated the Common Law in the twelfth and thirteenth centuries, were replaced by more timid successors in the fourteenth and fifteenth. More likely is it, as has been suggested, that the increasing size of the Government machine was driving the judges, originally part of the King's personal retinue,<sup>1</sup> away from the royal presence into remote official quarters, where they were no longer able personally to consult the King on novel points, but had to bear the consequences of steps taken on their own authority. In a vast, loosely administered Empire, such a position often led to encroachments by officials on the royal authority. In England, where similar action was impossible, owing to the greater vigour of the royal administration, it seems to have made the judges timid and conservative. At any rate, it is clear that, towards the end of the thirteenth century, there were complaints that the stream of royal justice was running dry; and the newly-formed Parliament took up the grievance in the great Statute of Westminster the Second of 1285. Apparently, Parliament felt that it was hopeless to appeal

<sup>1</sup> The 'Benches' (i.e. the King's and Common Bench Courts) were, originally, benches outside the King's Council Chamber; and the earliest judges who occupied them were chosen "from the King's private household."



to the judges ; so it ordered the Chancellor, as the custodian of the Register of Writs, to extend the scope of the law by making new writs 'in like case,' on the model of the old, to meet the needs of new circumstances.

This famous enactment was not without effect ; for ultimately, in pursuance of it, a whole new set of remedies known as 'actions on the case' were added to the practice-books of the Common Law. But the development of the law still failed to keep pace with the times ; and, towards the end of the fourteenth century, we find the Chancellor no longer contenting himself with acting on the powers of the statute of 1285, but giving direct relief to suitors who complained of 'defect of justice,' i.e. that their grievances were not provided for by the Common Law. This may not have been only because the Common Law did not recognize them as grievances, but also because the Common Law Courts (especially when held on circuit) were terrorized by turbulent nobles or cheated by fraudulent practitioners ; for, with the end of the fourteenth century, we approach the disturbed times of the Wars of the Roses. But still, the want of elasticity in the Common Law was admitted.

And so, again apparently without any formal enactment, suitors, instead of applying for new writs under the statute of 1285, got into the habit of presenting informal petitions or 'Bills' to the Chancellor, praying him "for God and in way of charity," to summon before him the person accused of causing the petitioner's grievance, and there examine him, and of his (the Chancellor's) grace, to cause remedy to be found for the petitioner, who had none at the Common Law.

Apparently also, after the turbulence of the fifteenth century had been put down by the strong hand of the Tudor monarchy, the new Chancellor's jurisdiction became restricted to supplying the defects of the Common Law jurisdiction ; and 'Equity,' as it came to be called, really assumed the character of an appendix to the Common Law, filling up its defects, correcting abuses in the conduct of persons who resorted to it for fraudulent or oppressive

purposes, and actually, though with caution, setting itself up as a rival to the Common Law Courts by offering superior remedies, even in cases in which the Common Law professed to afford relief. Thus, as an example of the first function, the Court of Chancery early assumed exclusive jurisdiction in the matter of 'uses' or 'trusts,' i.e. arrangements by which one person had undertaken to act as owner of property to be administered conscientiously for the benefit of another person or persons. The whole of this important branch of the law is the work of Equity; for the Common Law Courts refused to enforce such obligations, regarding them (not without plausibility) as opposed to the spirit of the Common Law. As an example of the second function, we may note the important body of doctrine built up by the Chancellors on the subject of the redemption of mortgages, which rapidly arose after the legal abolition of the ecclesiastical doctrine of usury had rendered the practice of lending money on mortgage, and taking interest therefor, a legitimate transaction. Of the third function, a good instance is the early practice of the Chancellors in granting the remedy of 'specific performance' as an alternative of the Common Law remedy of damages, for breaches of certain classes of contracts. For example, A would bargain to sell certain land to B for a thousand marks. Then, finding another person who would give twelve hundred marks for the land, A would break off his bargain with B. If B sued A in a Common Law Court, he would only get damages for the loss of his bargain. But B wanted the land, not the damages; and so he would "prefer a Bill in Equity," and the Chancellor would issue an order to A to convey the land to B, on pain of being put in prison if he refused.

One of the most conspicuous differences between the Chancellor's Equity tribunal and the Common Law Courts was in the matter of procedure. In addition to their rigid conservatism in the matter of writs, the Common Law Courts had, in the three or four centuries of their history, worked out a very stiff and technical method of trying cases, which really all centred round the employ-

ment of a jury to decide questions of fact. Juries in the Middle Ages were ignorant and not very intelligent; and, in order that they might perform their functions properly, the questions in dispute had to be narrowed down, so that they could be answered by a simple 'Yes' or 'No.' For this purpose a highly technical interchange of arguments, known as 'pleadings,' took place between the parties prior to the trial. Again, the inability of juries to distinguish between true and false witnesses led to the exclusion from the witness-box in common law cases of all persons who had any interest in the case, i.e. stood to lose or gain anything by its decision. Obviously, the persons most interested of all were the parties to the action; and it was an inflexible rule that the party to a common law action could never give evidence in it. Unfortunately, this rule, however good in intention, frequently excluded the evidence of all the persons who knew anything about the facts.

The Chancellors disregarded all these elaborate rules, and dispensed with the aid of juries. If they thought that the petitioner had a *primâ facie* case, instead of ordering him to 'purchase' an appropriate writ, with the risk of losing his action if he chose the wrong one, the Chancellor issued, not a Writ Original, but a mere judicial summons to the accused person, bidding him appear before our Lord the King in his Chancery, on such a day, in his proper person, under a penalty (*sub poena*) of so much, to answer the matters "within contained," i.e. in the bill or petition, on the back of a copy of which the summons, or *subpoena*, was indorsed. When, in obedience to the summons, the accused appeared, the Chancellor, usually a high ecclesiastic, familiar with the rites of the confessional, would subject him to a searching examination on oath, and then, instead of pronouncing a mere 'guilty' or 'not guilty,' as a jury would have done, he would issue a decree, ordering the parties respectively to perform certain acts or refrain from certain acts, involving such matters as taking of accounts, examining documents, setting aside contracts, refraining from insisting on legal



rights, and the like, with a view of doing justice between them. Evidently this was a much more flexible and exact process than the limited remedies of the Common Law Courts, which were, in practice, by that time, confined to ordering the sheriff to put a successful litigant in possession of land, or to 'make' a sum of money as damages out of the property of an unsuccessful one.

No wonder that Chancery became popular in the spacious days of Queen Elizabeth, or that, when the jealousy of the Common Law Courts brought on a pitched battle in the reign of James I, the latter, following the advice of his Law Officer, Sir Francis Bacon, himself a future Chancellor, should lay it down by solemn decree, that, where the rules of the Common Law and the rules of Equity conflicted, the latter should prevail. And this principle has been formally re-enacted in recent legislation, which has also put an end to the scandal of rival tribunals, by fusing the formerly independent Courts of Law and Equity, together with other and equally incompatible jurisdictions, into one great omni-competent Court, each judge of which exercises, concurrently, Common Law, Equity, and other jurisdiction, in accordance with the justice of the case. Nevertheless, as we shall see hereafter, the rival jurisdictions of Common Law and Equity have left deep and separate marks on English legal procedure, as well as on English legal doctrines.

This chapter could hardly conclude without a brief attempt to answer a question which an intelligent reader will naturally feel inclined to ask. In fulfilling their function of dispensing 'equity,' were the successive Chancellors acting entirely on their own views of what was right in each case, or did they borrow from any existing body of doctrine or practice? The answer probably is: "Both." The very fact that the early exercise of Chancery jurisdiction was sought and expressed as 'of grace' or 'charity'—a principle which has a practical effect at the present day—suggests that Selden's gibe that "Equity is a roguish thing, for that it varies as the length of the Chancellor's foot," had some measure of



truth in it, even in the seventeenth century. That the Chancellors borrowed some doctrines from the Roman Law, and some procedure from the Canon Law, can hardly be doubted. Also, the firmly established principle, that a Court of Equity was a 'court of conscience,' had its effect. But the writer's own view, though it is not capable of exact proof, is that, in laying down certain of their rules, e.g. that a mortgage was always redeemable, the Chancellors were guided by the practice of the 'good citizen'—i.e. the really upright and conscientious person; and, if so, the claim of Equity, that it acts on 'the conscience,' is intelligible. By the end of the seventeenth century, the rules established by the early Chancellors had hardened into a definite body of legal doctrine; and the regular publication of reports of Chancery cases had induced the Equity Courts, in practice, to adopt the theory of judicial precedent, borrowed from their Common Law rivals. Yet, just as the Common Law will never admit inability to provide for a case otherwise unprovided for, so modern Equity judges have again and again claimed their right to apply equitable maxims of conduct to new conditions. Obviously, while Common Law and Equity jurisdiction were exercised by different tribunals, there was a risk of rivalry. Happily now, as we shall see, every judge has both a Common Law and an Equity mind, and applies them both concurrently.

## CHAPTER IV

### THE FORMS OF ENGLISH LAW (*continued*)

#### 2. STATUTE LAW

UNLIKE a judicial decision, a statute is a formal announcement, expressed in language intended to be precise, of a rule of conduct to be observed in the future by the persons to whom it is addressed. In a comparatively few cases, it professes to be merely declaratory of existing law; though it is extremely doubtful, even in some of these cases, whether its framers really believed their own professions. And, in the great majority of statutes, there is no attempt to disguise the fact that the person or body which enacts the statute is openly imposing new rules of conduct. A statute (save in a very few exceptional instances) does not, like a judicial decision, attempt to settle a dispute which has already arisen, or to punish an offence already committed. When it does so it is said to be *ex post facto*; and *ex post facto* legislation is generally regarded as unjust. This conviction is, in fact, a strong (because unconscious) testimony to the belief, that the essential purpose of a statute is, not to declare the law, but to change it.

Statute-making, or legislation, is, as we have said, by the general consent of historical jurists, a more modern process than the establishment of the law by custom and judicial interpretation. It was certainly so in England. Centuries before the strong Kings of the Anglo-Norman line began to issue their 'Assises' or Ordinances (practically the oldest examples of statute law in England) the wise men or elders of the moots had 'deemed their dooms,' which were the ancestors of the later decisions of the King's judges on circuit. Statute-making did not become a regular practice till the establishment of Parliaments

in the thirteenth century ; and, even then, the number of statutes enacted was, for centuries, very small. Even now, in spite of the feverish activity of Parliament, the annual volume of its legislative Acts is usually not more than one sixth in bulk of the corresponding Reports in which are contained the decisions of the judges for the same period ; and it must be remembered that not much more than one in ten of the judgments rendered by the judges of the superior Courts is reported at all. It is, however, only right to remember, that the annual volumes of Acts of Parliament published in the ordinary series only contain the *public* Acts, i.e. those which are supposed to affect the conduct of the community as a whole ; while the private Acts, dealing with local or personal matters, can only be obtained on special application to the King's Printers. Still, in spite of these facts, and in spite of the lengthy and involved character of many Acts of Parliament, it can fairly be claimed for statute law that it is less 'bulky,' i.e. less voluminous in proportion to the work which it accomplishes, than judiciary law.

Closely connected with this fact is a cardinal distinction between judiciary and statute law in the way in which it is interpreted. The student of English judiciary law rarely finds a principle laid down in clear and simple terms in the judgments which constitute the records of that law. This may be rather a national peculiarity than an essential feature of judiciary law. Certainly in some countries the judges regularly prefix to their judgments a statement of the rules and principles which they conceive themselves to be applying ; and it has been suggested that English judges should do likewise. In fact they do not. The consequence is, that the advocate who relies upon the reports of decided cases to support his client's case, has to find the principle, or, as it is called, the *ratio decidendi*, of a given judgment, by a difficult process which it is hardly possible to describe in detail, but which involves, as has previously been said, many considerations, such as the circumstances of the case, the arguments put forward by the advocates on both sides,

the state of the law at the time when the decision was given, and the like. And it must be specially remembered, that the *ratio decidendi* in any given case may be expressed in the judgments of two, three, or even more judges, perhaps lengthy judgments, giving different reasons for the same conclusion.

Quite different, in theory at least, is the task of the interpreter of a statute. It is for him to apply, not the *ratio decidendi*, but the *litera legis* of the statute, i.e. he must be guided by the precise words used, and, unless there are clear indications in the statute that the words are employed in a special or technical sense, he must interpret them in their ordinary or dictionary sense. While, therefore, it could hardly be expected that anyone but a trained lawyer should be able to interpret judiciary law, it is assumed that the ordinary educated layman can follow the directions of a statute. Upon this assumption rests, very largely, the demand for codification, or general re-statement of the law in the form of a statute or statutes.

The theory is only to a limited extent true. It is, probably, to a large extent true of statutes like Orders in Council (the modern successors of the older 'Assises,' 'Ordinances,' 'Proclamations,' and the other forms of royal, or 'prerogative,' legislation), and municipal and corporation by-laws, which are usually composed by skilled draftsmen, enacted in a calm atmosphere, and confined in their operation to a very small range of subject. It is largely untrue of that most important of all kinds of statutes, an Act of Parliament which deals with a large number of controversial matters, and has, as a 'Bill,' or 'project,' to run the gauntlet of many hundreds of legislators, each anxious to contribute his item of improvement or criticism, few of them with any capacity for seeing the logical connection of one part of the measure with another, or knowing anything of the rest of the law of which the future statute is to be an integral part. Is it any wonder that such a measure often emerges from Parliament in a condition which at once makes it a problem



in interpretation, and invites disputes as to its meaning? Inevitably, these disputes can only be adjusted (in the first place at least) by the judges in the Law Courts; and it is they who have to take up the task of interpreting the meaning of a clause which, by the very fact that it is disputed, has shown itself capable of at least two meanings.

It is not very surprising, therefore, that judges, in interpreting statutes, have been occasionally obliged to depart from the strict rule of the *litera legis*, or rather, to resort to methods superior to those of the dictionary, for discovering what the letter of the law actually means. Centuries ago, an eminent legal authority found the key to the interpretation of statutes in a consideration of "the old law, the mischief, and the remedy," i.e. by reflecting on what was the evil which rendered the existing law insufficient, and the method by which the new strove to deal with it. A valuable guide to both these facts is often to be found in the preambles or explanatory statements prefixed to the 'operative parts' of statutes; but these have tended, in recent legislation, to become infrequent, and some of the older ones can hardly be acquitted of an intent to deceive. Thus the judges are driven back on their own conclusions as to the general purpose of the statute by a consideration of its language as a whole, subordinating particular sentences to that general purpose, and thus giving a *logical*, rather than a *literal* interpretation of it. In doing so, however, they are prohibited, by an apparently arbitrary, but probably very wise rule, from examining any of the discussions on the statute in the legislature which enacted it, or from taking into account any of the public or private announcements of its framers as to the effect which they intended the measure to produce. Other, minor, rules of interpretation have grown up, e.g. that if two clauses of a statute are inconsistent, the former prevails, and that 'general words' must be restricted in their operation to objects of a class similar to those dealt with in the specific provisions of the statute. Thus, if a statute dealing with

the transport of dairy produce in hot weather prohibited the transport of eggs when the temperature was above 65 degrees, of milk when it was above 70, and butter when it was above 75, and then proceeded to prohibit the transport of "all other articles whatsoever" when the thermometer rose above 80 degrees, these general words would not prohibit the transport of coal, or even race-horses, at a temperature above 80 degrees. This last is known as the *ejusdem generis* rule of interpretation, and is not confined to the interpretation of statutes.

It is common in popular and even, to some extent, in legal language, to treat 'statute' and 'Act of Parliament' as equivalent terms. That is quite incorrect. All Acts of Parliament are statutes; but all statutes are not Acts of Parliament, though Acts of Parliament are unquestionably the most important kind of statutes.

Moreover, Acts of Parliament in this country are distinguished from all other kinds of statutes by one important feature. Their validity, as distinguished from their interpretation, can never even be discussed in a Court of Justice. This may not have been the case in the earliest days of Parliament, when the status of Parliament as compared with that of the other Councils of the Crown was doubtful. But, before the end of the sixteenth century, it was admitted that an Act of Parliament was the most authoritative possible expression of English Law, superior even to Royal Orders in Council and the most solemn decisions of the highest Courts of Justice. Indeed, after England ceased to be an island State, and became the centre of a world-wide Empire, it was still assumed that Acts of the Parliament at Westminster were supreme law throughout that Empire. And, though recent developments have modified that view as far as the overseas Dominions are concerned, it still remains strictly true for the United Kingdom of Great Britain and Northern Ireland unless the contrary is expressed in the Act itself. This feature is expressed in legal form by the statement that, so far as England is concerned, an Act of Parliament cannot be *ultra vires*.

That is not true of the other kinds of statute law, of which we must now say a word.

Of these the most important is the 'Order in Council,' i.e. an Order professing to be made by the King with the advice of his Privy Council, a large body with a great history, which has long ceased to meet for the discussion of business. In reality, an Order in Council is framed by or under the direction of a Minister of the Crown, and presented at a formal meeting of two or three Privy Councillors, usually in the presence of His Majesty, who authorizes its inclusion in the Minutes of the Council meeting. This is really a very startling development of Ministerial authority; for it appears to confer upon the will of an individual subject the immense power and prestige formerly exercised by the King with the advice of his most secret counsellors.

The explanation is, of course, that the Minister responsible for the Order is not only a member of a small body, the Ministry of the day, to whom the country, through its elected representatives, has entrusted the government of the nation, but, in the great majority of cases, he is acting under powers expressly conferred by Act of Parliament. This truth is expressed, though somewhat awkwardly, in the title "Statutory Orders in Council" given to such Orders in the official publications. Other Orders or Rules made by Ministers, as Heads of Departments of State, in their own names, or by the Judges of the High Court, stand in a similar position. A very few Orders are occasionally issued by the King by virtue of what is called the Royal Prerogative, i.e. such remainder of his once almost unlimited authority as is left after the inroads made upon it by Act of Parliament and the Common Law in the long course of English constitutional history.

These Orders and Rules now contribute, at any rate in bulk, almost as much as Acts of Parliament to the annual output of legislation, and do, apparently, represent a very considerable revival of Executive as distinct from Parliamentary authority. The safeguard against them lies in the fact that any judge, high or low, before whom



any one of them is brought for enforcement, may treat it as *ultra vires*, i.e. unauthorized by the Act of Parliament, prerogative, or other alleged warrant for its existence. This he will do, if he thinks it right, not by proclaiming any repeal of the Order or Rule, but by simply ignoring its existence and refusing to apply it to the case before him. Whereupon, as all other judges of equal<sup>1</sup> or lower rank will imitate his attitude, according to the doctrine of judicial precedent, formerly explained, the Order or Rule becomes, in effect, a dead letter, unless and until revived by the decision of a higher tribunal reversing the decision of its predecessor. Even an Order in Council made during war under the wide authority conferred by the Defence of the Realm Acts, has been so treated. It is needless to say that the statutes of minor authorities, such as municipal corporations and railway companies ('by-laws' as they are called) are similarly liable to be treated as *ultra vires*. And, in the case of these minor authorities, the Courts do not limit their corrective power to by-laws which go beyond the express powers conferred upon the body which issues them. It is sufficient that the by-law is 'unreasonable' for it to be condemned. Thus, where the municipal council of a borough, in pursuance of its "power to make such by-laws as to them seem meet for the good rule and government of the borough," issued a by-law to the effect that no one but a member of His Majesty's military forces acting under orders should sound or play upon any musical instrument in any of the streets of the borough on a Sunday, the High Court refused to enforce the by-law, which thereupon became ineffective.

There is one other feature of statute law worth noticing. Judicial decisions may become obsolete by lapse of time and change of circumstances. They are then not treated as precedents by the Courts, and cease to form part of the Law. It is not always easy to decide exactly when a decision has become obsolete; but the principle is clear. It is expressed in the maxim: *cessante ratione cessat et*

<sup>1</sup> This is not strictly true of subordinate tribunals, e.g. County Courts and Quarter Sessions, whose decisions do not create precedents.



*lex ipsa*, though it is unfortunate that the term *lex*, which primarily stands for a statute, should here be used for a non-statutory rule.

For it is clear that the maxim has no application to statutes. These are 'permanent,' in the sense that, until they are formally repealed, or expire by effluxion of time fixed by themselves for their operation, they must (subject to the rule of *ultra vires*) be given effect to by the Courts. For to do otherwise would challenge the authority of the legislature enacting them, which, at any rate in the case of Acts of Parliament, the Courts have no power to do. The result is not altogether fortunate. It is a well-known fact that the supporters of an unpopular statute will look on with resignation while it is being broken, but that the moment it is proposed to repeal it they band together and exert every effort to prevent the repeal. The consequence is a compromise. The statute is not repealed, but it is not enforced, or it is enforced only on rare occasions. This is a bad state of things, because it tends to diminish respect for the Law, as well as to give occasion for arbitrary treatment.

The fact that the lay public do, in some cases, try to remember statutes, while they rarely, if ever, attempt to refer to judicial decisions, renders a word on the naming of statutes necessary.

Acts of Parliament were at first named after the places where they were passed. Thus we have the Statutes of Merton (1235), Marlborough (1267), Winchester (1285), and Gloucester (1278). But when Parliament became fixed at Westminster, this plan was no longer possible; and, for a short time, the practice (borrowed from the example of the Papal Bulls) of quoting the first two words of the text of the statute, was adopted. Thus the famous *De Donis* (establishing entails) and *Quia Emptores* (sanctioning alienation of land). About the end of the thirteenth century, a practice which lasted for five centuries was set up. An Act of Parliament was quoted as a chapter of *the* statute of the session of Parliament in which it was passed; and this session was defined by the regnal

year of the King who summoned it. Unfortunately, in many cases, a session of Parliament covered part of one regnal year and part of the next. Consequently, it was necessary to refer to two regnal years; and the formula ran :

3 & 4 Edw. VI. c. 8,  
29 & 30 Vict. c. 39,

and so on.

In the fifteenth and sixteenth centuries, perhaps, the accessions and demises of kings were more prominently fixed in the public mind than the calendar years; though (to judge by published correspondence) it looks as though Saints' Days were the popular method of dating. And, in any case, especially after Lord Chesterfield's reforms, the use of the New Calendar familiarised people more and more with its dates, while the length of the reign of George III, and the increasing number of Acts of Parliament, must have made calculation by regnal years more and more difficult. Still, the legal public struggled on with the mediæval form, though the old perverse rule that all the enactments of any Session were deemed to have been made on the first day of that session, was abandoned in 1793. At last, when the reign of Queen Victoria promised to rival in length that of her grandfather, legislators mercifully incorporated in their Acts what were known as 'short titles,' i.e. brief descriptions of them which should convey to the lay mind some idea of the subjects with which they dealt, and the date at which they became law, e.g. The Corrupt Practices Prevention Act, 1854. This practice, after having been increasingly followed for about forty years, received official approval in 1889; and, in 1896, an attempt was made to apply it retrospectively to such of the earlier Acts of Parliament as survived, and were of practical importance. Thus, whereas the lay enquirer finds it difficult, if not impossible, to study judiciary law in its original form, owing to the technicalities of its literature, he need have no serious difficulty in tracing in the volumes of Acts of Parliament, annually

published, and to be found in most public libraries of importance, any public Act of which he is in search. But, of course, he must remember that, except in comparatively few cases, such as the Army Act and the Government of India Act, he will not be sure that the whole, even of the statute law on any subject, is to be found in any single Act of Parliament. Most Acts of Parliament of any importance are amended from time to time by later Acts ; and only in a comparatively few cases are the various Acts relating to a single subject consolidated into one complete statute. Again, there is always the question, how far it is safe to rely upon the provisions of a statute without knowing something of the judiciary law on the same subject.





PART II

*THE MACHINERY OF ENGLISH LAW*



## CHAPTER V

### ENGLISH COURTS OF JUSTICE

IN primitive civilizations there is no attempt at specialization. Functions which seem to us to be completely different in character, and to require special training for their exercise, are performed indiscriminately by the same people, who do not appear to realize that different qualities of mind, and different kinds of training, are required to perform each properly.

There can be little doubt that this was true of the class of officials who ultimately developed into the judges of the modern Courts. Save for the fact that they were royal officials, there was, probably, hardly anything in the *ministri regis* who went round the circuits in the latter half of the twelfth century to suggest their successors of to-day. Primarily, perhaps, the former were tax-gatherers; but they were expected in a general way to look after the interests of the Crown in all directions, including the management of the royal estates, the supervision of the local authorities, the enquiry into irregularities in the feudal franchises, and, particularly, the investigation of any of the numerous events which might give rise to a claim by the Crown for fine, forfeiture, casualty, or other item of revenue.

Gradually, however, there separated from what was, probably, quite a large body of officials, a small body of men whose special business it was to 'hold pleas,' i.e. to decide disputed questions arising out of these numerous claims of the Crown. In the case of an autocratically governed community, like one of the ancient Oriental monarchies, such claims would simply have been put forward as demands to which the only responses could be compliance or punishment. But it is remarkable that,

in England at any rate, even the powerful Anglo-Norman monarchs never claimed arbitrary power of that kind, but attempted to justify all their demands by reference to some law which supported them. Doubtless, in some cases, the attempt was merely colourable, in others based on chicanery or verbal trickery. But the tacit admission, even in such cases, of the necessity for a legal basis, was an invaluable contribution to the cause of ordered progress.

Thus, for the oldest and, perhaps, most important class of disputes with which the royal officers had to deal, we get the name 'Pleas of the Crown,' which is to-day the technical description of that most important class of judicial business which we call 'criminal.' The essence of it is, that the Crown is claiming to impose a punishment or penalty upon an accused person for a breach of the law, alleged to have been committed by him.

Now in order that a process of this kind may be carried through scientifically and accurately, four distinct steps must be taken. First, there must be a definite accusation by a person who professes to know of the commission of the offence. Then there must be proof of the facts. Then there must be an authoritative statement of the rule which the offender is alleged to have broken. And, finally, if the offence is proved, there must be condemnation and punishment. In the 'wild justice' of revenge, these steps are equally taken; but they are taken all at once by the same person. The avenger is accuser, witness, judge, and executioner in one. It is of the essence of civilized justice that these steps should be separated in time, and that they should be taken by separate persons; and a vital stage in the progress of civilization occurs when the community sets aside certain persons and trains them for the important function of the decision of disputed claims. In the earlier days, this selection had been made in various ways; and it was only in the twelfth and thirteenth centuries that the vigorous action of kings like Henry I and Henry II gave to the royal judges a prominence and a permanence which ultimately resulted in a monopoly of the administration of justice by the



Crown. Never after the close of the thirteenth century was any Court of Justice set up in England without the royal authority. An attempt to do so would probably have been regarded as treason.

But the account of the origin of English criminal justice given above necessarily raises an important question. Does it not allot to the Crown the inconsistent parts of prosecutor and judge? It is one of the fundamental conceptions of justice that no one shall be judge in his own cause.

Unquestionably it was long before the administration of English criminal justice was relieved from the stigma of that criticism. Probably at first the information on which a criminal charge was based came from casual 'informers,' who reported it to the sheriff, who laid it before the body of sworn accusers (or 'indictors') whom King Henry II, in his great Ordinance or 'Assise' of Clarendon in 1166, made the essential accusers in all serious criminal cases. These are the 'grand jury' of modern times. But, with the restriction of the activities of the sheriff which soon followed, the Crown felt it to be necessary to appoint officers formally charged with the prosecution of offences; and thus, in effect, the Crown became both prosecutor and judge, and it is unquestionably true that, for many centuries, the scales of justice were on this account heavily weighted against the accused. Perhaps the most practical mitigation of this hardship lay in the fact that a large number of criminal prosecutions always were, and still are, in substance, carried on by the parties more immediately aggrieved by the alleged offence, though the proceedings are necessarily in the name of the Crown. A later, and more scientific guarantee was the complete independence of position secured to the English judges by the famous clause of the Act of Settlement of 1700, which provides that "Judges' Commissions be made *quamdiu bene se gesserint*" and "their salaries ascertained and established"—a provision which removes from them the fear of dismissal or reduction of salary if they should fail to please the King or the Ministers in

power. Many other improvements in the administration of criminal justice, which will be noticed in due course, have at last made of a criminal trial an exhibition of patience and forbearance on the part of the prosecution which is hardly to be seen in the attitude of the plaintiff in a private lawsuit.

In contrast to criminal justice, stands civil justice, the nature of which is, as was earlier pointed out, that the 'plea,' or matter in dispute, is not between the Crown and its subject, but between one of the Crown's subjects and another. In essence this is a much older thing than criminal justice. Long before the State, as embodied in the King or ruler, had entered the field of justice, rough arrangements for superseding the wild justice of revenge by the peaceful settlement of disputes had been developed in England, as in other countries. 'Moots,' or assemblies for speech and counsel, were an almost inevitable consequence of any attempt at social life; and the Anglo-Saxon Laws show us the moots busily engaged in persuading people between whom quarrels have arisen, to 'stay the feud' and submit their dispute to the ordered methods of primitive justice—the trial by clearing oath and ordeal, or the acceptance of the cattle-fine in lieu of corporal vengeance. The Anglo-Norman monarchs found these methods in force in England, and, so far from opposing them, at first abstained altogether from setting up any rival claims, and indeed insisted that they should be followed as before.

But even the most primitive minds can make comparisons if the materials are put before them; and, apparently, the Englishman of the twelfth and thirteenth centuries contrasted unfavourably the slow and old-fashioned ways of the local moots with the superior efficiency of the royal procedure, with its skilled judges and its new jury-system. And so, they began to bring their cases to the notice of the King's judges on their circuits, and beg for them to be decided by the new procedure. At first, perhaps, the royal judges regarded this movement as a nuisance, adding to their work. But soon the ad-

vantages which it brought to their master and themselves, not only in the form of increased influence and knowledge, but in the more prosaic form of fees and emoluments, produced a change of attitude ; and, from the end of the twelfth century, we see growing in the minds of the royal officials a steady determination to crush out all rivals in the administration of justice. Thus alongside the ‘pleas of the Crown,’ the pleas of the subject, or ‘common pleas,’ came to be recognized as an important part of the royal prerogative of dispensing justice ; and the famous enactment of the Great Charter, that “common pleas shall no longer follow our Court, but shall be held in some certain place,” shows that its framers were determined to convert a prerogative right into a public duty. Thus we get the first classification of Courts of Justice into criminal and civil, sometimes, no doubt, overlapping, but in the main clearly distinguishable. Let us take first the Courts which dispense criminal justice.

#### A. THE CRIMINAL COURTS

One of the firmest convictions of the old Common Law was that a crime could only be committed in the body of a county. This was because, through the county system, the royal government, and, with it, as we have seen, the administration of justice, were brought directly into contact with the mass of Englishmen. Not only was the trial of a crime conducted in the county in which it was committed, but the preliminary proceedings—the accusation and apprehension of the alleged offender, his safe custody or enlargement on bail, finally, the execution of the sentence if he were found guilty—were entrusted to the county officials. Thus the ‘commissions,’ or authorities empowering the royal judges to hear and determine pleas of the Crown or deliver the gaols of accused persons by trying their cases, were county commissions from the first, and have so remained to the present day. *Primâ facie*, a crime will be tried in the county in which it was



committed, at the ' assizes ' or sittings of the commissioners empowered to hold pleas of the Crown there. Three times in the year (in very populous centres four) a Proclamation will be made that on a certain day a royal commissioner will visit the county town to try charges preferred by indictment of the grand jury of the county. Of the preliminary steps taken to bring the accused persons to justice, as also of the procedure by which the trial itself is carried out, we shall have to speak in some detail in a later chapter. Here it is sufficient to repeat that, by the theory of English Criminal Law, the proper place for the trial of any serious offence against that law is the shire-town of the county in which it was committed, by a royal commissioner or judge, through the medium of a county jury.

But this ' close system,' as it may be called, has its practical disadvantages. Those criminals who astutely select county boundaries as their places of abode can cause the authorities a good deal of trouble by committing crimes in one county, and then, when they know that there is a warrant of one of that county's magistrates out against them, slipping over into another county, where the warrant cannot be executed, because the magistrate who signed it has no jurisdiction there. In order that it may be executed, it must be ' backed ' or counter-signed by a magistrate of the county to which the offender has fled ; and, before this can be done, the offender may have changed his county once more.

This was one, though by no means the only reason why London became, towards the close of the eighteenth century, such a favourite resort of criminals. London is a border city. The active thief, who had looted a goldsmith's shop in the Strand, could, in a few moments, escape the jurisdiction of the Middlesex magistrates by fleeing over Westminster Bridge into Surrey. Ere his baffled pursuers could get their Middlesex warrant ' backed ' in Surrey, he could reach Kent, and, while a Kentish Justice was being sought, be back again over London Bridge into Essex, and so on. Moreover, London, as the



greatest port in the world, was, naturally, the resort of a huge population of foreign mariners and traders, many of whom were 'wanted' for crimes committed on the high seas. But the high seas are not in the body of any county; and the only way by which such persons could be put on trial was by means of some such pious fiction as that the Spanish Main was in the parish of St. Mary le Bow, in Cheapside, in the County of Middlesex.

These were the chief reasons why the new Central Criminal Court which was lodged in the 'Old Bailey,' or keep of Newgate Prison, was set up by statute in 1834. In theory, the Court is a curious body, consisting, in addition to the Lord Chancellor and all the Judges of the King's Bench Division of the High Court, of the Dean of Arches (an ecclesiastical judge), the Aldermen of the City of London, and the Recorder, Common Serjeant, and Judge of the Sheriff's Court of the same Corporation. The three latter persons, though officials of the Corporation, are appointed by the Crown to the exercise of their judicial functions, and are invariably trained lawyers; and they dispose of the bulk of the numerous cases tried at the Court, while the more serious charges are tried by one of the Judges of the King's Bench Division, selected according to a rota. The sessions of the Court, twelve annually, are fixed by General Orders made by the Judges of the High Court. The Central Criminal Court exercises jurisdiction over crimes committed in a large and densely populated area which covers parts of no less than four counties; and, during eight months of the year, its jurisdiction may be extended by Order in Council over the rest of the same and adjoining counties. In addition to this local jurisdiction, the Court can try crimes committed on the high seas or elsewhere abroad; and certain rather exceptional trials of peculiar importance and difficulty, such as trials of offences against the Official Secrets Acts and the Corrupt Practices Acts, and trials of persons accused of homicide in the exercise of military authority, are entrusted to the Court. It is almost needless, after this statement, to add, that the Court has unlimited juris-

diction with regard to the gravity of offences ; no offence is too serious to come under its purview. It was, in fact, recently decided that even the King's Bench Division itself, to which we must now turn, had no disciplinary or corrective control over the Central Criminal Court.

The position of the King's Bench Division of the High Court of Justice is somewhat anomalous in respect of criminal jurisdiction. Primarily, it is a branch of a great Court of civil jurisdiction ; and, as such, its composition and functions will be later discussed. But its members exercise criminal jurisdiction at ' assizes '—they are, in fact, in nine cases out of ten, the Commissioners appointed to dispense justice on circuit ; and, as we have just seen, the King's Bench Division supplies that member of the Central Criminal Court at each of its sessions to whom the trial of the most important cases is entrusted.

But, beyond this, the King's Bench Division has inherited the criminal jurisdiction of the ancient Court of King's Bench, the tribunal which remained specially associated with the person of the King after the Common Pleas had been fixed at Westminster by Magna Carta. As the intimate Council of the King, against whose peace every serious crime was assumed to have been committed, it acquired an exceptional and supervisory control over all courts exercising criminal jurisdiction in the King's name, as well as over other jurisdictions. It does not ordinarily try criminal cases. But, at the demand of the Crown, it conducts a solemn trial of specially heinous offences of a political character, by the exceptional procedure of three Judges and a jury. This method, known as a ' trial at bar,' was last resorted to in the case of Roger Casement, convicted of high treason during the Great War. To the King's Bench Division, and for like reasons, belongs the jurisdiction to issue the so-called ' Prerogative Writs,' by which the control of the Crown over inferior tribunals is exercised. Thus, if, by reason of local prejudice or excitement, it is thought expedient, in the interests of justice, that an approaching trial should be removed from the county in which the offence is alleged

to have been committed, to another 'assizes,' the change is effected by a writ of Certiorari issued by the King's Bench Division to the tribunal before which the case would normally have come. If an inferior tribunal refuses to do its proper duty, the King's Bench Division will (after giving opportunity for explanation) issue to it a Mandamus to compel it to do its duty. And if an inferior tribunal is exceeding its jurisdiction, it will be restrained by a writ of Prohibition issued by the King's Bench Division. For special reasons, the most famous of all the Prerogative Writs, the writ of Habeas Corpus, of which more will hereafter be said, can be issued by any judge or tribunal of a superior Court. But the normal tribunal to issue it is the King's Bench Division.

### *Lower Criminal Courts*

We must now turn to the other Courts which exercise criminal jurisdiction, but with restricted powers. The most important of these tribunals are the Courts of Quarter Sessions which exist in all counties and in a certain number of boroughs. In the counties, they consist, in theory, of all the Justices of the Peace for the county; in practice, of such of them as choose to attend. The Justices of the Peace (commonly called 'magistrates') are men and women appointed by the Crown during pleasure to perform numerous judicial, administrative, and executive duties prescribed for them by a long series of Acts of Parliament. Except in the case of the 'stipendiary' magistrates appointed for London and a few other large towns, they receive no remuneration for their labours; and many of them have had no legal training. *Primâ facie*, therefore, a county Quarter Sessions Court is about as bad a tribunal as could be imagined for the trial of serious criminal offences. In practice, its chief deficiencies are overcome by the election of a Chairman who is, usually, a person of legal training, and who, in fact, performs most of the functions of a judge of an individual tribunal—controlling



the advocates and witnesses, directing the jury, and pronouncing judgment and sentence. But, in matters of substance, such as the amount of a sentence, he is only the mouthpiece of the majority. It is not, therefore, surprising, in view of these facts, that the conduct of trials of certain important offences is withdrawn from Quarter Sessions. But these reservations are few in number, and are diminishing. In Quarter Sessions boroughs, the Court is constituted, not by the borough Justices, but by a professional Judge, called a 'Recorder'; but the jurisdiction of borough Quarter Sessions is not greater than that of county Quarter Sessions. A Recorder is only a 'part time' Judge. When his own court is not sitting, he may, and usually does, practise as a barrister before other tribunals.

From what has been said, it will be gathered that the jurisdiction of Quarter Sessions is, to a large extent, coincident with that of the Assizes, and that, therefore, it is possible for a person accused of any one of a large number of offences to be tried by either Court. That is so; and, in practice, the choice of the tribunal in any given case is usually determined by the accident of which Court is expected to sit soonest after the accused is ready for trial.

Each county is divided, for judicial and magisterial purposes, into Petty Sessional Divisions, with a view to the distribution of the great mass of business which is not of sufficient importance to demand the attention of the whole of the Justices at Quarter Sessions; and every borough having its own Commission of the Peace, is likewise a Petty Sessional Division. This business consists mainly of the trial of offences 'summarily punishable,' i.e. in which the accused is not, *primâ facie*, entitled to trial by a jury, as he is in more serious cases. The distinction between 'indictable' offences (i.e. offences which are, ordinarily, tried by a judge and jury), and offences summarily punishable, will be explained more fully in a later chapter. Here it is sufficient to say, that the latter are, in the first instance, disposed of by a Petty Sessional



Court, which, except when it is constituted by a Stipendiary Magistrate, must comprise at least two Justices of the Peace (but may include more), who are ordinarily resident in the division. Such a tribunal is really little more than an informal committee of Quarter Sessions; and either party may, in many cases, insist upon a rehearing of the case before Quarter Sessions. In such an event, however, Quarter Sessions will proceed by summary methods, i.e. there will be no jury, and the sentence which the Court can pronounce will be strictly limited. In practice, Petty Sessional Courts also conduct the preliminary hearing of an accusation of an indictable offence; but here their function is magisterial, not judicial, and all that they have to do is to decide whether the accused is to be 'committed for trial' at Assizes or Quarter Sessions or the Central Criminal Court, on the ground that there is at least a *primâ facie* case against him.

Until the year 1908, there was no appeal, in the ordinary sense of the word, from a decision in a criminal case. From early times the House of Lords had exercised a jurisdiction to quash a decision for "error apparent in the record," i.e. where it appeared, from the records of the tribunal itself, that it had erred in law. From 1848 onwards, there had existed also a Court for Crown Cases Reserved, consisting of the Judges of the three superior Common Law Courts, for the purpose of deciding upon questions of law, arising in the course of a criminal trial, voluntarily referred to it by Judges presiding at Assizes or the Central Criminal Court; the prisoner's sentence being, in the meantime, suspended. But both these classes of cases were rare. More important was the power, exercised voluntarily or under a Mandamus of the King's Bench Division, of a Court of Quarter Sessions to 'state a case' for the opinion of the King's Bench Division upon a point or points of law involved in a criminal trial before it; and such a proceeding is now, technically, an 'appeal.' But it was not until the passing of the Criminal Appeal Act, 1907, that a formal right of appeal in criminal cases, even on a question of law, was recognized; while the

verdict of a jury on a question of fact could never be made the subject of an appeal in any way. The Act of 1907, however, gives the person found guilty on an indictment an absolute right of appeal on a question of law, and a qualified right on a question of fact, to the Court of Criminal Appeal, which consists in each case of not less than three Judges of the King's Bench Division, but may comprise any larger uneven number. A condemned person may even appeal, though admitting his guilt, on the ground that the sentence awarded him was excessive ; though when appealing on this ground, he runs the serious risk of having his sentence increased by the Court to which he appeals. And he must also, if he wishes to appeal from the amount of his sentence, obtain preliminary leave of the Court of Criminal Appeal to do so ; while, when appealing on any other question of fact, he must obtain the leave either of that Court or the Court which tried his case. The Criminal Appeal Act superseded the appeals on 'error' and the jurisdiction of the Court for Crown Cases Reserved, above alluded to, but provided that, in a case of exceptional importance on legal grounds, the Attorney-General might grant a certificate which would enable either the accused or the prosecutor to appeal to the House of Lords. Advantage was recently taken of this provision to obtain a decision of the highest authority on the difficult and important question, how far (if at all) is voluntary drunkenness a defence to an accusation of homicide.

## B. CIVIL COURTS

These tribunals, as has been explained in the preceding chapter, deal with disputes between citizens or subjects, which are submitted for decision to the royal tribunals. As was also explained, in the same chapter, the complete victory of the royal jurisdiction in such matters over all its rivals was the outcome of a long struggle in which, by force of superior effectiveness, the royal courts were vic-

torious. And the fact that a learned author, writing so late as the year 1909, could enumerate upwards of 160 ancient civil courts at one time exercising independent jurisdiction, and still, in theory at least, in existence, as well as to refer his readers to a comparatively recent statute which had formally abolished forty-two others, is a significant reminder of the severity of that struggle.

At the present time, of course, all effective jurisdiction in disputes between citizens is exercised by judges appointed by the Crown. We have seen in an earlier chapter that, at one time, these judges were of different ranks, appointed to decide different classes of cases, with the natural result, that there were rivalry, jealousy, and overlapping between them, with unfortunate consequences to the suitor. Happily, these defects in the administration of civil justice have largely disappeared through the effects of recent legislation ; and it is now a simple matter to classify civil tribunals into 'superior,' i.e. those with unlimited authority, both as regards place of origin and importance of interests involved in the case, and 'inferior,' i.e. those whose jurisdiction is limited by one or other of these considerations. Within the courts of unlimited jurisdiction it will be necessary to draw a further distinction between those which are of 'first instance,' i.e. before which cases come for their first hearing, and the appellate courts, to which appeals are made with the object of reversing the decisions arrived at by the courts of first or second instance.

As the result of the effort made in the year 1875, previously referred to, to consolidate into one homogeneous tribunal all the various 'superior' royal Courts, the High Court of Justice is now the one 'superior' Court of universal jurisdiction of first instance in civil cases throughout the realm. Any civil proceedings, of whatever kind, which are really in the nature of litigation between citizen and citizen, can be begun in this Court, before any of its judges, of whom there are at present twenty-eight, though one of them, the Lord Chancellor, seldom, owing to his multifarious other duties, acts as a judge of the



Court. The other twenty-seven are, for functional purposes, divided into three unequal classes—the Chancery Division (six judges), the King's Bench Division (eighteen judges), and the Probate, Divorce, and Admiralty Division (three judges). But every one of these judges (including the Lord Chancellor) is legally capable of hearing any civil case which can come before any division of the Court, and of exercising any power, formerly exercisable by any of the Courts absorbed into it.

The headquarters of this Court are in London ; but the members of the King's Bench Division habitually travel round the ' circuits ' or ' assizes ' before described, usually in pairs, of whom one tries the criminal cases arising within the county, and the other the civil (or ' *Nisi Prius* ') cases, which, for any reason, are more conveniently disposed of there than in London. There are also local ' District Registries ' at which the proceedings preliminary to trial in such cases can take place, in order to avoid the expense and labour of getting such proceedings effected in London.

Moreover, although, as has been said, any Judge of the High Court may be called upon to decide any civil case, yet, inasmuch as it is obviously convenient and expeditious that cases should be broadly classified according to their character, and heard by Judges especially familiar with the class to which a given case belongs and the procedure which the disposal of it involves, the three Divisions of the High Court do, in substance, represent the traditions of the old Courts from which they take their names, and dispose of cases which would, before 1875, have been heard before such Courts respectively. Thus certain classes of cases are ' assigned ' to each of these divisions ; and a plaintiff who commences a case in an unsuitable division may (and probably will) have it transferred to the appropriate division. But he will no longer, as in former days, be liable to have it dismissed for want of power to deal with it. And, above all, he will not be sent for one part of his remedy to one division, to another for another ; the fundamental purpose of the great



reform scheme of 1875 being, in the words of the Judicature Act itself, "that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided."

It is not strictly true to say that the High Court of Justice is purely a court of first instance. It acts as a tribunal of appeal, not only in the hearing of 'cases stated' by Quarter Sessions and other lower criminal courts, as previously explained, but from decisions of the County Courts, the usual tribunals for the first hearing of civil cases involving small pecuniary value. Something will be said later on of the right of litigants in such cases in the matter of appeals. Here it is sufficient to note, that such appeals come before what is called a Divisional Court of the High Court, i.e. a tribunal consisting normally of two Judges of the King's Bench Division, though all judges of the High Court are legally qualified to act on such occasions. As no question of fact can come before such a tribunal, there are no witnesses and no jury. The Court decides the case on the report of the County Court Judge, and the record of the evidence taken before him, after hearing the advocates for the parties.

### *'Inferior' Civil Courts*

Putting aside the exceptional 'palatine' Courts of Lancaster and Durham, which deal with equity matters arising within a somewhat vaguely defined jurisdiction, and certain other surviving courts, such as the Mayor's Court of London and the Liverpool Court of Passage, the civil courts of limited or 'inferior' jurisdiction are the statutory County Courts, founded on a general plan in the year 1846, and since more than once endowed with increased powers. The name County Court is misleading, for these statutory tribunals are not, like the Justices of the Peace, part of the county organization, nor are their powers at all analogous to those of the ancient shire or

county court, whose name they have assumed. They are tribunals placed wherever the needs of the population demand them; being grouped into 'circuits' to which a professional judge (or, occasionally, two judges) is appointed by the Lord Chancellor on permanent judicial tenure. The County Court Judges administer precisely the same law as the High Court, but only in cases arising within their specified districts, and only, as a rule, when these cases do not involve money above a certain amount and are not of exceptional difficulty or importance. Thus a County Court cannot adjudicate on a claim for damages for more than £100, or exercise equitable jurisdiction where the property involved is worth more than £500, nor can it entertain actions for libel, slander, seduction, or breach of promise of marriage, except where the parties agree to submit to its jurisdiction. In some matters, however, a County Court exercises unlimited jurisdiction, e.g. in the matter of claims under the Workmen's Compensation Acts (where the judge acts as arbitrator), or in bankruptcy, though not every County Court exercises bankruptcy jurisdiction. About forty County Courts (there are some four hundred and fifty in all) exercise Admiralty jurisdiction; and in such cases they can hear claims for towage, necessities, or wages, up to £150, and other maritime claims up to £300.

### *Appellate Courts*

Finally, we have to deal with courts which are courts of appeal only, i.e. which have no jurisdiction to hear a case until it has been decided in the first instance by a lower tribunal.

The original scheme of the Judicature Act of 1873 was to create an all-embracing civil tribunal, part of which, the High Court of Justice, was to be, as we have seen, a court of universal civil jurisdiction, but (in the main) of first instance only, while the Court of Appeal was finally to determine appeals from any branch of that Court. That

is why the combined court was named the Supreme Court of Judicature, though in fact it is not now supreme. For this scheme, as we shall shortly see, was altered at the last moment in one very important respect. But the plan for an omni-competent court of civil appeal remained. The Court consists of the Lord Chancellor and certain other *ex-officio* members who, by reason of their other duties, seldom act in the Court of Appeal, and by six or, possibly, seven working members, of whom two are, technically, *ex-officio* members, while the remaining five, known as 'Lords Justices of Appeal,' are specifically appointed as members of the Court. The working *ex-officio* members are the Master of the Rolls, an official with a very interesting history in connection with the old Court of Chancery, and the President or senior judge of the Probate, Divorce, and Admiralty Division. The former sits regularly as the senior judge of one of the two panels of three members into which the Court of Appeal habitually divides itself for the purposes of business. There is no difference in powers or authority between the two panels, which are obviously the result of the facts that there are six judges who make the work of the Court the first claim on their time, while three members of the Court are required to give a final decision in an appeal from the High Court. As a matter of convenience (but no more), one panel usually takes appeals from the King's Bench Division, and the other those from the Chancery Division of the High Court and the Chancery Courts of Lancaster and Durham.

As in the case of the Divisional Courts when hearing appeals from County Courts, the Court of Appeal accepts the facts as found by the court of first instance, and considers only questions of law. Witnesses and jury find no place in its procedure. Even where it is entertaining applications for a new trial in a court of first instance, made on the ground that on the first hearing a jury has brought in a verdict contrary to the evidence, the Court of Appeal goes no further than to consider whether, on the evidence as given in the court below, a jury, acting



intelligently and honestly, and without taking other considerations into account, could have arrived at the conclusion at which it did arrive. If that is not, strictly, a question of law, it is a question of expert criticism for which the material is supplied by the judges' own experience.

The highest appellate Court in English cases is the House of Lords, to which go also appeals from the Court of Session in Scotland, and the Court of Appeal in Northern Ireland. Broadly speaking, the disappointed litigant can appeal to the House of Lords from any final decision of the Court of Appeal, except when the case started as an ordinary action in a County Court, when special leave to appeal to the Lords must be obtained. The House of Lords is generally assumed to be a legislative body. As a matter of fact, its history stretches so far back, that it reaches a time when the difference between legislative and judicial functions was not understood; and the distinction has never fully established itself in that House. In theory, any member of the House, however uninstructed in legal questions, can take part in a decision involving the most difficult points of law. This was, doubtless, one of the reasons why the framers of the Judicature Act of 1873 strove to abolish the jurisdiction of the House of Lords as an appellate tribunal. But, though they succeeded in getting their proposals on to the Statute Book, these were in this respect revoked by an Act of two years later, before they had actually come into operation. Still, even the Government which had come to the rescue of the House of Lords at the eleventh hour felt that it was necessary to do something to remove the stigma above alluded to from the supreme appellate tribunal. It was provided, therefore, by the Appellate Jurisdiction Act of 1876, that no appeal can be decided by the House unless at least three 'Law Lords' (either eminent lawyers specially appointed life members of the House for the purpose, or holders or former holders of high judicial office who happen to be members of the House) are present at the hearing of the arguments. But it will be observed that there is nothing in law to prevent the most ignorant



member of the House of Lords from determining by his vote an appeal of the highest moment, and the greatest complexity, involving life or honour, or property of enormous value.

Appeals from the Overseas Dominions of the Crown do not go to the House of Lords, but to the Judicial Committee of the Privy Council. Such appeals are not directly concerned with English Law, and, therefore, do not form part of the subject of this book. But it will be remembered that, by the terms of the Criminal Appeal Act, 1907, criminal cases of exceptional difficulty and importance, may on the certificate of the Attorney-General be made the subject of appeal to the House of Lords, which exercises judicial functions also in the case of peers charged with felony, and impeachments for political offences.

## CHAPTER VI

### THE LEGAL PROFESSION

THE administration of the law requires the co-operation not only of judges, with whom, aided by juries, the decision of disputed cases rests, but of practitioners, or trained experts, to whose hands the parties to the dispute confide their interests. At least this is so in all modern and complex systems of civilization; and indeed the legal expert can be traced very far back in human history. At the same time, almost all systems of law, and certainly the English, allow full liberty to the individual litigant to conduct his own case, both in its initial and final stages, if he thinks fit to do so. Before the establishment of the modern system by which legal assistance is given free to poor litigants, the 'plaintiff in person' or the 'defendant in person' was a not uncommon figure in the Law Courts. Even now, he is sometimes to be seen, especially in the lower tribunals; the judges, with the humanity which has long distinguished them, being exceptionally patient and forbearing with such suitors.

The legal profession is, in England, the exclusive monopoly of a body of men and women who are deemed to have given evidence, in manner to be hereafter described, of their fitness for their responsible calling. Subject to the right, previously explained, of every litigant to act on his own behalf, and every person to conduct his own business, any person, not a member of the legal profession, who attempts to act as such, whether or not with a view to gain, incurs serious penalties, and cannot enforce any promise of remuneration which may have been made to him for his services. The chief practical trouble is to know exactly what constitutes an attempt to act as a legal practitioner; and this depends on somewhat arbitrary enactments, founded on practical convenience rather than

on intelligible principles. Thus, a person who, not being a member of the legal profession, prepares, even for reward, a will or an agreement under hand only, relating to property, is not guilty of any breach of the law, unless he actually poses as a qualified lawyer. On the other hand, a similar person who prepares a marriage settlement or a bond, incurs a penalty of fifty pounds.

For at least six centuries, the legal profession in England has been divided into two mutually exclusive branches, each performing distinct duties, though certain functions are common to them both. These are (*a*) barristers, or counsel, and (*b*) solicitors, formerly known as ‘attorneys.’ Both are found almost from the beginnings of the Common Law; and it is difficult to say which is the older. But their histories have been very different.

### BARRISTERS

The barrister, or counsel, is characterized primarily by the fact that he speaks in court, and addresses the judge and the jury on the actual trial of the case, questioning the witnesses, protesting against any attempt of his opponent, which he deems to be unfair, to prejudice his client’s chances, and generally, taking the part which his client would have to take if he conducted his case in person. Originally, the barrister appears to have been a casual by-stander who volunteered advice to a litigant, and, acquiring a taste for the practice, gradually obtained recognition by the Court as suitable to be ‘of counsel’ with litigants. But his detached position survives in a very striking way in the modern rules of law that no barrister can make a binding contract for, or sue to recover, his fees, that he cannot bind his client by anything he says in court, and that, on the other hand, he cannot be sued for negligence in the conduct of a client’s case.

Though there is much that points to the fact that it was originally by the recognition of the Court that the barrister owed his opportunity of audience, yet for cen-

turies the privilege of 'calling to the bar,' i.e. investing a candidate for forensic honours with the degree of barrister-at-law, has been exercised by four wealthy and powerful bodies known as the Inns of Court, viz. Lincoln's Inn, the Middle and Inner Temples, and Gray's Inn. These bodies are entirely self-governing, they are administered by co-opted bodies of 'Benchers' or seniors, who publish no account of their proceedings, and they are practically uncontrolled by any Act of Parliament. Much about their origin still remains obscure; but it seems generally agreed, that they were originally voluntary clubs or associations of pleaders in the King's Courts at Westminster, set up, as we have seen, in the twelfth and thirteenth centuries, to administer the royal jurisdiction, and, particularly, the newly-formed Common Law. The Templars owe their ecclesiastical connection to the fact that, on the dissolution of the Crusading Order of the Knights Templars in the early fourteenth century, the two bodies of lawyers moved from their former hostels, somewhere in the neighbourhood of High Holborn, to the still older abode of the Knights, with its ancient church and tilting-ground, on the banks of the Thames.

For some centuries after their foundation, the members of the Inns of Court received their clients personally, either in their chambers or at some public rendezvous like St. Paul's Cathedral, and advised them indiscriminately about their affairs as a whole, not confining themselves to appearances in Court or formal consultations. Shortly after the Restoration, however, they began to adopt an exclusive attitude, both towards their lay clients, and also to the attorneys, who withdrew from their societies, and, to a large extent, from their precincts, where they had formerly lived in common with them.

The consequences of this aristocratic policy were important. Doubtless it enhanced the social prestige of the barrister and made of him a figure which might mix with courtiers and statesmen on more or less equal terms, thus opening freely to him the road to public offices of the highest distinction. On the other hand, it threw



together the attorney and the lay client in the outer world, and left the barrister, at any rate in his earlier years, very much at the mercy of the attorney, who, reversing the former condition of affairs, became the barrister's client instead of his employee. Above all, the initial stages of all business, and the complete handling of much, fell into the hands of the attorney, whose position rapidly improved, until he became a fully independent practitioner, not only in the country town (where there was no barrister to rival him), but in London. The right of the barrister to transact business with his lay client without the intervention of an attorney (or 'solicitor' as he is now known) is still asserted by the barrister in a very few cases. In substance, the barrister, unless he is retained by the Crown or some great corporation, has no business, forensic or consultative, but that which solicitors bring him.

It must not, however, be supposed, that the important monopoly of 'call to the bar' is exercised arbitrarily by the Inns of Court. Broadly speaking, and subject to unimportant exceptions, call to the bar is open to every British subject who fulfils certain prescribed conditions; and, in recent years, even foreigners have become English barristers. This is possible, because, unlike a solicitor, a barrister is not, as such, an official in any sense of the word. He is simply a tested and qualified person who has the right to speak on behalf of clients before any tribunal, and to advise them in all their legal affairs. But it is understood that the Inns of Court do not undertake, as a matter of course, to 'call' any foreigner who fulfils the prescribed qualifications, as they undoubtedly do in the case of British subjects.

These qualifications are, briefly, as follows:

1. After having passed a general educational test and given evidence of good character, the candidate must procure himself to be admitted as a student at one of the four Inns of Court above named.

2. He must then 'keep' twelve terms (covering three years) by dining in Hall six days (or, in the case of members of an University in the United Kingdom, three days)

in each term—not necessarily consecutive. Students who have achieved certain academic distinctions are dispensed from keeping two of their twelve terms; and the Bench of each Inn reserves a general discretion to shorten the required number of terms in individual cases.

3. He must pass certain qualifying examinations in law conducted by a body called the Council of Legal Education, formed by the co-operation of the four Inns, which also maintains a staff of Readers who give public lectures and impart other tuition to candidates for call to the Bar.

On fulfilment of these qualifications, the candidate, if he (or she) has attained the age of twenty-one, and has paid the fees required by his Inn (about £180 in all), is entitled to present himself for ‘call to the Bar’ at the next ‘Call Night’ of his Inn. But notice of his intention is ‘screened,’ i.e. placed in a conspicuous position on the screens or notice-boards, not only of his own, but of all the Inns of Court, for some time before the ceremony; and it is open to any one who sees it, or hears of it, to inform the Benchers of the candidate’s Inn of any circumstance alleged to disqualify the candidate from being called, e.g. that he has, during his qualification period, engaged in any of the callings which are deemed to be inconsistent with the profession of a barrister, or has been guilty of criminal or dishonourable conduct. The candidate has, of course, an opportunity of rebutting the charges; and, if he fails to do so to the satisfaction of the Benchers of his Inn, he may appeal to the Judges of the High Court as a body. If no charge is made or proved against him, the duly qualified candidate is called to the bar by ancient ceremony at the close of dinner on Call Night, and is thenceforth entitled to exercise all the privileges and functions of a barrister.

But the fully-qualified barrister does not cease to be a member of his Inn, or to be subject to its jurisdiction. In all matters of professional conduct involving serious issues, and in all matters gravely affecting personal character, the barrister’s Inn of Court is still the guardian of the public interest. If his conduct has been such as to

disqualify him for membership of an honourable profession, he can, subject again to an appeal to the Judges of the High Court, be 'disbarred' by the Benchers of his Inn of Court, and thereby deprived of his professional standing. In matters of professional etiquette, as distinguished from morality, his conduct is watched, and, to a smaller extent, controlled, by the General Council of the Bar, a representative body, somewhat recently formed by voluntary action among barristers themselves. This body has no official authority; but it is probable, so strong is the force of professional opinion, that a barrister who defied its rulings would find himself so coldly treated by his colleagues, that he would become suspect also with his professional clients, the solicitors, and, in effect, soon lose whatever business he had. Finally, in all his conduct in Court, the barrister owes courtesy and deference to the judge, in whose hands lies the control of the whole proceedings. But it is one of the most honourable and valuable traditions of the English Bench to accord to advocates, in the interests of their clients, the utmost liberty which can be made consistent with the orderly and dignified conduct of business.

Finally, it may be mentioned that, among the members of the Bar, there is a comparatively small group of senior men, enjoying certain privileges and subject to certain disabilities, known as King's Counsel, or (from the fact that they wear silk instead of 'stuff' gowns in Court), 'silks.' In one sense these men are an anomaly; for they are, technically, Crown officials, and, until quite recently, could not appear for any client against the Crown without a special licence. But, unlike the old Serjeants-at-Law, whose place they have taken, they remain members of, and subject to the jurisdiction of, their Inns, they have no monopoly of business in any Court, and they do not constitute a different Order from their brethren of the Outer Bar. They occupy the front benches in the auditorium of the court 'within the bar,' by custom they receive somewhat higher fees than the 'juniors' or ordinary barristers, for their work, and they have priority



of audience. On the other hand, they are prohibited, by professional etiquette, from undertaking certain kinds of business, which remains the monopoly of the Junior or Outer Bar. King's Counsel are appointed, for various reasons, on the advice of the Lord Chancellor, by Letters-Patent of the King.

#### SOLICITORS

The other branch of the legal profession is that known as 'solicitors of the Supreme Court.' Historically, they are a combination of several formerly distinct professions : the attorneys of the Common Law Courts, the solicitors of the Court of Chancery, the proctors of the old ecclesiastical jurisdictions, and the scriveners, who, until the end of the eighteenth century, were a kind of high-class law-stationers.

Of these elements the oldest, and that which has had perhaps the greatest influence in defining the position of this branch of the profession, is the attorneys. As their name implies, they were, originally, agents (*attornati*) of litigants, and, as such, can be traced back in legal history almost, if not quite, as far as barristers. The earliest lawsuits were, in substance, and, indeed, often in form, judicial duels ; and, naturally, early law did not allow the parties to be represented by agents, unless in exceptional cases, such as those of women and children. But, as the primitive judicial combat gave way to the ordered and technical lawsuit, perhaps involving long and wearisome journeys, the privilege of being represented by an agent was increasingly sought, and was granted by the authorities of various jurisdictions. Quite naturally, the different Courts in which these agents appeared were interested in their identity and character ; and, by the end of the fourteenth century, the King's Courts of Common Law had adopted the practice of inscribing on their rolls or records the names of certain persons whom they would recognize as agents for the parties in proceedings before them. This practice naturally tended both to



make the attorneys thus privileged a close profession, and to establish them as officials of the Court, which, equally naturally, reserved the right to 'strike off the roll,' or otherwise summarily punish, any of them found guilty of malpractices. 'Solicitors,' in the strict sense of the word, were never agents, but appeared in connection with Equity proceedings towards the end of the sixteenth century, to 'solicit' the causes of the suitors which were slumbering too long in the chambers of the Masters in Chancery. By the beginning of the seventeenth century, they had come to be regarded as a profession on a footing similar to that occupied by the attorneys; and, before the middle of that century, the two professions were virtually consolidated into one, though differences of qualifications still remained. After their withdrawal from the Inns of Court, formerly alluded to, attorneys and solicitors migrated, to a certain extent, to what were known as the Inns of Chancery, institutions perhaps even more ancient than the Inns of Court, but never attaining anything like the wealth or efficiency of the latter. Indeed, they became virtually extinct by the end of the eighteenth century, their places as professional institutions being taken by the Law Society, a chartered corporation which now occupies towards the solicitors' branch of the legal profession somewhat the same position as that of the Inns of Court towards the Bar. Meanwhile the scriveners, as a distinct profession, had become moribund by the end of the eighteenth century; their business passing into the hands of solicitors. And lastly, in the year 1857, the extinction of the matrimonial and probate jurisdiction of the Church courts, combined with the decay of their other functions, extinguished the proctors as a separate profession, most of them joining the ranks of the solicitors; the whole of the legal profession, other than the Bar, becoming merged in one body, receiving the official designation of 'Solicitors of the Supreme Court' by the Judicature Act of 1873.

It has been stated above that the Law Society (formerly known as the 'Incorporated Law Society') stands in

much the same position towards solicitors as do the Inns of Court towards barristers. That statement must, however, be qualified by the very important reservation, that, whereas the qualifications for admission to the profession, admission itself, and discipline, are, in the case of barristers, entirely dependent on tradition and custom as expounded by each Inn of Court on its own authority, in the case of solicitors, such matters, except to a minor extent, are expressly fixed by Acts of Parliament, which the Law Society has to administer, and by the provisions of which it is bound. Moreover, the actual admission of a solicitor to practice is the function of the Master of the Rolls, who holds the high judicial position before described, as well as the even more interesting office of custodian of the vast stores of legal and other records accumulated in the Record Office. Consequently, the Council of the Law Society, important as its work is, has a much less free hand than the Inns of Court.

It goes, therefore, almost without saying, that though foreigners cannot, naturally, become officials of English Courts of Justice, membership of the solicitors' branch of the legal profession is open to all British subjects who acquire the necessary qualifications. These may be set out as follows :

1. The passing of a preliminary test of general education.
2. Apprenticeship or service under articles of clerkship to a practising solicitor for a period varying from three to five years, according to the previous attainments of the clerk. This service is exclusive ; and, unlike the Bar student, the articulated clerk cannot devote any part of his attention to matters other than the study and practice of the law.
3. Attendance (except in special cases) for one year at a centre of legal education approved for the purpose by the Law Society, which itself provides and maintains a Principal and Teaching Staff for the purposes of providing legal education for articulated clerks and intending articulated clerks. Of course the one year's attendance at a Law School is a minimum ; as a matter of fact, an articulated clerk, both in London and other great centres, often voluntarily attends for three or even more years.

4. The passing of certain qualifying examinations (known respectively as the Intermediate and the Final) in legal subjects, conducted by the Law Society.

The fees payable, at various dates, in the course of this progress towards the solicitors' branch of the legal profession, will amount, at present rates, to about £130. But this estimate takes no account of the 'premium' or fee payable to the solicitor with whom the future solicitor is articulated to serve his qualifying apprenticeship. The amount of this is purely a matter of arrangement between the parties, and is in some cases mitigated by the claims of family ties or personal friendship. Nevertheless, it is in many cases heavy, varying with the value to the articulated clerk of the experience which his master's practice is likely to afford him, the prospects of promotion which it offers, and the like. Further, it should be mentioned that, so long as he continues to practise, the solicitor will have to pay an annual tax to the State, varying, according to circumstances, from three to nine pounds.

On fulfilment of these qualifications, the articulated clerk, having attained the age of twenty-one, and given evidence of good character, will be admitted, as of course, to membership of his profession. He will then be legally qualified to undertake such kinds of legal business as are open to his branch of the profession. His right of audience in Court is limited, for the most part, to inferior tribunals, such as Petty Sessions and the County Courts, and to appearances in procedural matters before the Judge or Master 'in chambers,' i.e. sitting privately. But all the preliminary conduct of litigation is the exclusive province of the solicitor; while the field of 'conveyancing,' i.e. the preparation of documents dealing with the countless non-litigious legal interests of the members of the public, he shares with the barrister, having, as has been explained, a practical monopoly of direct dealing with clients. Except where a formal 'counsel's opinion' is deemed necessary, the solicitor is the sole legal adviser of the lay public in non-litigious matters. At important board and syndicate meetings, at which such a large amount of the vast financial, commercial, and industrial affairs of the country is settled,



the solicitor of the institution is nearly always present, to advise upon legal questions which crop up in the course of discussion. In delicate family matters, involving reputation and property, he is, almost invariably, consulted. To the great middle ranks of the community, he is, almost more than the judge, the representative and expounder of the law. Unlike the judiciary and the forensic branch of the great legal profession, the solicitors' branch is not concentrated in London, but is to be found in every town, almost in every village, of the kingdom.

Unlike the barrister too, the solicitor deals with his clients on a strictly business basis. His fees, it is true, are regulated by Act of Parliament; but he may bring actions to recover such as are due to him. Moreover, unlike the barrister, he, as his client's agent, can bind the client within the scope of his ostensible authority, and is, on the other hand, legally liable for the consequences of negligence in the conduct of his client's affairs. He shares with the barrister a complete legal immunity in the lawful conduct of his client's lawsuits; nor can he be compelled (nor is he, indeed, entitled) to divulge, even as a witness in Court, any facts which may have come to his knowledge affecting his client's interests, in the course of, or preparatory to, the litigation.

Finally, like the barrister, the solicitor is liable, not only to the penalties of the law for all illegal conduct, but also to professional censure for conduct prejudicial to the reputation of his profession. The solicitor is, indeed, under the control of a double professional authority. As an official of the Supreme Court, he can be struck off the Roll of Solicitors by the Master of the Rolls for professional misconduct—a process equivalent to professional death. But he is also subject to the disciplinary control of the Council of the Law Society, whose Discipline Committee, appointed by the Master of the Rolls, has, by recent statute, power to apply, subject to an appeal to the Court, the same drastic penalty, as well as to inflict minor professional punishments for lesser offences.



## CHAPTER VII

### THE ADMINISTRATION OF JUSTICE

WE now come to that process for which the preceding chapters on the Courts of Law and the legal profession have been but a preparation, viz. the actual application of the law to the affairs of the every-day life of the men and women of whom the community is composed. This is, of course, the supreme practical test of the virtue of a legal system. An ideal body of law, though it may have its value as an inspiration and a model, is not of much practical use unless it is effectively and justly administered. Indeed, it might even be urged, that an illogical and otherwise imperfect body of law, effectively, dispassionately, honestly, and humanely administered, is of more value as an instrument of social peace and prosperity than an ideal system badly administered.

The actual process by which the administration of justice is carried on in England is by the carrying out of what are known as Rules of Procedure—i.e. a body of regulations binding alike on all who resort to the Courts for redress of grievances as well as those who preside or practise therein. These Rules of Procedure, bulky and highly technical in character, though resting, ultimately, on parliamentary authority, are, in effect, the work of the judges, assisted by committees representative of both branches of the legal profession. In addition to these formally enunciated rules, there are a large number of so-called 'rules of etiquette' which very largely govern the conduct of legal proceedings. For breach of these there is no precise penalty ; but, so strong is the corporate feeling of the legal profession, that offenders against them seldom have the opportunity of repeating their offences.

It would obviously be out of place, in a work like the present, to attempt even a summary of these numerous Rules of Procedure. They are matter for experts, i.e. those who actually practise, or intend to practise, the profession of the law. Nor would it be of particular value, in a work intended to insist on the civic rather than the professional aspects of law, even to reconstruct the different stages of a typical lawsuit. There are plenty of admirable works in which this is done in great detail. It is proposed in this chapter rather to bring out those salient and characteristic features of English legal procedure which have given to the English administration of justice its peculiar and, indeed, almost unique position in the civilized world. It is a matter for legitimate pride to English men and women that experts come from all the ends of the earth to study the working of English justice; and it is right that English citizens should be able to recognize the features which have aroused the interest of intelligent critics from other civilizations.

It is proposed to set out, first, the dominating features common to the administration of justice generally in England; and then the distinctive features peculiar to the administration of the criminal law and the civil law respectively. It will be understood that, in what follows, reference is made only to the ordinary tribunals which administer the law to ordinary citizens. The military tribunals (or 'courts-martial') set up under the Naval Discipline Act and the Army and Air Force Act, deal only with professional combatants, or with auxiliary troops when called out for active service. They have nothing to do with the affairs of the civilian community. These military tribunals, admittedly, differ in some ways in their procedure from the rest of the King's Courts of Justice, though it is not a little interesting to note how many of the best features of the civilian tribunals have been adopted by them. However, this book does not profess to deal with them, nor, for similar reasons, with ecclesiastical tribunals.

## GENERAL PRINCIPLES OF ENGLISH JUSTICE

1. It is one of the most conspicuous features of English justice, that all judicial trials are held in open court, to which the public have free access, and that the parties have a right to be represented, and to have their interests defended, by skilled advisers from among the barristers and solicitors described in the last preceding chapter.

This feature is so much of a common-place to the modern Englishman, that he hardly realizes its importance. But, if he will think for a moment, of the difference between the English system and those, quite common in other countries, where the proceedings are conducted in secret, and where, in criminal cases, the accused is not necessarily entitled to be represented by skilled advisers, he will hardly fail to grasp the difference. To put it shortly, the English system ensures that the enormous force of public opinion is brought to bear on the proceedings in Court, and that judge and jury are compelled to hear both sides of the case. The former appears to have been the rule in England from time immemorial; and much of the effectiveness of English public opinion, whether expressed by word of mouth or in the public prints, may be said to be due to it. Only in rare instances, of which the notorious Court of Star Chamber is the most conspicuous, has the rule been violated; and the unpopularity of such exceptions is the best proof of the value attached by the nation to the general rule. The latter feature (the necessity for hearing both sides of a case) is so essential a feature of English justice, that it is even enforced on those domestic and professional tribunals which are not Courts of Justice at all, but merely administrative bodies having quasi-judicial duties to perform. Thus, in a well-known recent case, where the committee of a social club, on a complaint by one member that another member had been guilty of conduct which rendered him unfit to remain a member of the club, expelled from the club, under rules authorizing them to do so, the member complained of, without giving him an



opportunity of rebutting the charges, the Court condemned the action of the committee as fundamentally inconsistent with the principles of justice, and awarded damages to the expelled member, though the facts on which the complaint against him was based were not disputed.

It must be admitted that the rule, that every accused person may be represented by skilled advisers, is by no means so old in English Law as the rule of open administration of justice. Down to the end of the seventeenth century, no counsel was allowed to appear on behalf of a person accused of felony at the suit of the Crown, except when a point of law arose for discussion. This was, of course, a grave blot on English justice, the origin of which it would take too long to explain. Suffice it to say, that the first effort to remove it was due to the magnanimous attitude of King William III, who, in spite of the fact that he was peculiarly exposed to the attacks of traitors, gave his consent to the Treason Act of 1695, which allowed persons accused of High Treason to be defended by counsel. But the rule was not made universal till 1836. The exceptions to the rule of open court are very rare, consisting practically only of three cases: (1) where children are, unhappily, required to give evidence in cases involving decency or morality; (2) where the case involves 'secret processes' (i.e. trade secrets unprotected by patent rights), which would disappear if they were discussed in public; and (3) in prosecutions under the Official Secrets Acts, where the publication of the evidence, or statements made in the course of the proceedings, would be prejudicial to the national safety. It is remarkable that though, in the year 1908, an Act passed for the punishment of incest laid it down that all proceedings under it should be held *in camera*, i.e. secret, yet that, owing to the strong representations of the judges that the suppression of public trials for this offence, revolting as they necessarily were, actually resulted in members of the classes specially affected not knowing that such practices were criminal, the secrecy clause was repealed in 1922.



It must, of course, be remembered, that the principle of publicity only applies to the actual trial of a case, not necessarily to the preliminary or prefatory stages of the proceedings, such, for example, as the preliminary enquiry which takes place before an accused person is 'committed for trial' on the charge of an indictable offence. As a matter of fact, such enquiries are usually held in public; but they need not be, and, sometimes, in the interest of the accused himself, are not.

2. The burden of proof is, in almost every case, upon the accuser. That is to say, the person making a charge that his opponent has broken the law must, whether in a criminal or in a civil case, bring evidence to prove, or at least to raise a strong presumption of proof, that the accused person was in fact guilty of the offence charged. Of the nature of 'evidence' something will be said later. Here it is sufficient to state that, in an English Court of Justice, the attitude of the tribunal is, not that the accused must give proof of his innocence, but that the accuser must establish, if not with scientific completeness at least with practical certainty, the guilt of the accused, and especially in criminal cases. Should he fail to do so, the accused may, without offering any explanations as to his own conduct, simply submit that there is 'no case' against him, and will thereupon be entitled, as a matter of course, to be discharged. He is not required, as in some other systems, to give an account of his doings and movements, in order to free himself from the charge. The mere fact that he is made to appear in Court does not raise the slightest presumption in law that he is guilty; and, whatever may be the private opinion, or even the knowledge, of the judge or the jury, every person is presumed to be innocent until he has been proved to be guilty.

From this fundamental rule of English justice, the exceptions are singularly few.

One of the most important is the doctrine of what is called 'judicial notice.' Judges are human beings, of more than average intelligence and knowledge; and it would be farcical to assume that they do not know the

facts with which the least intelligent member of the community is acquainted. Thus, for example, if the charge against an accused man is that he was found loitering in the dark in suspicious circumstances, it would be absurd to require the prosecutor to prove that it was dark out of doors between midnight and 2 a.m. in December, or that a General Strike was going on in May, 1927, or a war from August, 1914 until the autumn of 1918. Such facts as to who are the reigning monarchs, at any rate of European countries, what territories are comprised within the British Empire, the ordinary course of nature, e.g. that a woman over sixty years of age would be unlikely to bear children, are equally subject to judicial notice, and need not be proved.

Then again, what are known as 'presumptions' occasionally create exceptions from the rule that every material fact necessary to prove the charge alleged must be proved by the accuser. In the ordinary sense of the word, a presumption is merely an inference which the ordinary man draws from the occurrence of certain facts. For example, if a man is seen going about in desperately untidy or thread-bare garments, the presumption is that he is either very careless or very poor. That is a mere presumption of fact; and, as a rule, such a presumption is merely an item in the evidence to be balanced against facts on the other side. But there are a few 'presumptions of law' which really do relieve an accuser from the burden of proving all essential facts. Such, for example, is the presumption that a document thirty years old, produced from the proper custody, was in truth signed by the person who appears to have signed it. Or again, the presumption, now embodied in the Larceny Act, 1916, that a person accused of receiving goods which he knows to have been stolen, was, if shown to have been recently convicted of a similar offence, aware of the fact that the goods in question were in fact stolen goods. Needless to say, it is open to the accused, in either case, to rebut the presumption, if he can. But the 'burden of proof' is transferred to him.

Finally, the rule known as *res ipsa loquitur* has much the same effect as a presumption of law—perhaps is, really, only an instance of presumption. It may be stated thus. If an inanimate object under the control of the defendant in an action causes damage to the plaintiff in a manner which, in the ordinary course of things, does not happen if it is properly controlled, and the person in control of it is legally bound to exercise proper care to prevent it damaging the plaintiff, then there arises a presumption that the defendant did not exercise proper care to prevent the damage which occurred. Thus, if a passenger in a public street is struck on the head by a brick which falls from a contractor's skip as it is being hoisted on to a building abutting on the street, the burden of proof will be on the contractor to prove that he did not act negligently, not on the passenger, who brings the action against him, to prove that he did. Thus, also, negligence is always presumed against a railway company in the event of a collision by which passengers are injured.

3. It follows logically from the last rule, that the only facts which may be taken into account in arriving at a decision of a case are the probative facts which have been established during the proceedings, by testimony, judicial notice, presumption, or admission of the parties. These probative facts are known as the 'evidence'; and the rules of evidence are so characteristic a feature of English justice, that they will require a separate chapter to themselves. Suffice it to say here, that, as a general rule, the probative facts relied upon must be testified to by witnesses in open court, speaking from first-hand knowledge, knowing that they stand under a liability to criminal prosecution for perjury if they deliberately or recklessly do not speak the truth, and subjected to cross-examination by the opposing party's advocate—a searching process by which defects in the 'evidence in chief' of a witness can be severely tested. Naturally, in most cases, there will be a conflict of testimony, more or less acute, between the parties; and it will be the task (in some cases very difficult) of the jury, or, if there is no jury, the judge, to balance



the weights of the conflicting testimonies. There is no formal rule which they are required to follow in arriving at a conclusion. But it is said that, before finding an accused person guilty in a criminal prosecution, the net result of the evidence must be such as to leave no reasonable doubt of the accused's guilt, while, in a civil case, the mere balance of probabilities may be adopted. And again, in one or two cases, such as treason and perjury, two witnesses are required to prove each charge, while the testimony of accomplices in crime is always looked upon with suspicion, and, in some cases, needs, in order to be legally acceptable at all, corroboration (i.e. support from other and independent evidence) in material points. Finally, there is the rule which requires the testimony of the plaintiff in an action for breach of promise of marriage to be corroborated by independent evidence. Hence the importance of correspondence in such cases.

The important principle which we are now considering probably owes its origin to the prevalence of the jury system in England—a subject to which reference will later be made. And yet, curiously enough, it was, historically speaking, with the jury that the difficulty of establishing it arose. For the jury, as we shall see, was originally a body of persons sworn to 'recognize' or testify to facts within their own knowledge; and, down to the end of the seventeenth century at least, it was judicial doctrine that a jury might convict, or refuse to convict, in spite of the evidence, if their own knowledge justified them in so doing. But the rule changed rapidly during the first half of the eighteenth century; and, by the middle of the eighteenth century, the modern principle was clearly established.

4. In all serious criminal cases, the accused must be tried, not by a judge alone, but by a jury; and, in civil cases involving an accusation against the moral character of either of the parties, that party may, if he thinks fit, demand the verdict of a jury. This rule necessarily involves a brief account of the famous institution of the jury.



A jury may be defined as a body of lay persons (usually twelve) summoned by royal writ to give a verdict on oath as to the facts upon the evidence laid before them, under the direction of a royal official. As has been hinted before, the development of the jury system in the twelfth and thirteenth centuries was a masterly move of the Anglo-Norman monarchs in their struggle for the monopoly of the administration of justice. Despite its original unpopularity, it rapidly drove out of existence the older methods of trial by oath-helpers, battle, and ordeal; and when, later on, it became clear that it might afford an excellent means of protecting the subject against the oppression of the Executive, in such matters as sedition, libel, and other political offences, it became, almost as much as Parliament itself, one of the Englishman's cherished possessions. Like the Parliament, it was imitated in other countries, especially during the nineteenth century, but, like Parliament again, not with complete success. Finally, despite its undoubted services to the cause of civilization (of which the comparative rarity of judicial torture in English legal history is a striking example), it has sunk a good deal in popularity in recent years, and was, indeed, almost extinguished in civil cases during part of the Great War. Nevertheless, it is safe to say, that the day is far distant at which it will disappear from criminal trials for serious offences; for not only does it relieve the judge of what would, in many cases, be an almost intolerable strain of anxiety, but, by its severe demand for unanimity before a verdict of guilty can be pronounced, it secures an almost complete certainty that an innocent man will not be convicted of a serious crime.

Different kinds of juries are known to English Law. There is the Grand Jury of the county, which assembles at the Assizes or Quarter Sessions to present true bills of indictment against persons who have been committed for trial by the magistrates, in manner hereafter explained, or, on the other hand, to throw out bills if they consider them baseless. Thus the Grand Jury is not a deciding

but an accusing body ; and, though at one time very important, it has now, with the careful regulation of magisterial jurisdiction, become rather an anachronism. Its accusations do not require unanimity ; but at least twelve members must concur for a true bill to be found. The Petty Jury is, on the other hand, the jury which, under the directions of the judge, brings in a verdict of guilty or not guilty in a serious criminal case, which, as we have said, must, to be effective, be unanimous. If a petty jury cannot agree, it is discharged ; and the accused can be put on his trial again. A common jury occupies a similar position in civil cases ; and a special jury is a specially qualified jury, also for civil cases, obtainable at the request of one of the parties. Jurors are enrolled from qualified persons by local registration officials, and a list or 'panel' sufficient to serve the requirements of the Court is presented at the beginning of each session. The names of the men and women on it are taken in the order in which they appear on the panel ; but each party has a certain right of 'challenge' or objection, which may be either 'peremptory' (i.e. without reason given) or 'for cause,' and either 'to the array' (i.e. to the whole panel, on the ground of irregularity or partiality) or 'to the polls' (i.e. to individual jurors). Jury service is compulsory on men and women ; but there are many legal exemptions, and the judge may, either on the application of one of the parties, or on his own motion, order that a jury in any particular case shall be composed of men only, or of women only.

But of course, the impartiality, skill, and independence of the judge in any case, criminal or civil, are quite as important as the independence of the jury. It becomes therefore essential at this point to say something with regard to the judicial staff of the English Courts of Justice ; and the more so that its constitution and characteristics are markedly peculiar to the English system.

In all civil cases, and in all the most important criminal cases, the judge is a Crown official ; but a Crown official of a most exceptional kind. Though appointed on the

advice of the Ministry of the day, he is rarely (except in the case of three or four of the highest judicial posts) a person who has taken an active part in politics. Even if he has done so, he is forbidden by law to continue his activities by being a member of the House of Commons; and any prominent association with politics by any member of the professional caste of judges would be most gravely condemned by public and professional opinion.

Further, a judge of the class of which we are now speaking can only be recruited from among the ranks of barristers, who, in the case of members of the Court of Appeal must be of fifteen years' standing, of the High Court ten years', and of the County Court Bench seven years', at the least, at the time of his appointment. There is no statutory requirement as to actual experience of practice; but, as a matter of fact, it is an almost invariable rule only to appoint to any of these tribunals persons who have had considerable experience as advocates.

Moreover, these judges are placed in a position of independence by the fact that they enjoy stipends which, though not on the scale of incomes earned by successful barristers, are of substantial amounts (varying according to their rank), and, what is equally important, are fixed by Act of Parliament and payable automatically out of the Consolidated Fund or general revenue of the Crown. Thus there is no possibility of the Executive Government influencing the judges by threats or promises in the matter of their stipends, which do not pass under the annual review of the Ministry.

Most important of all, these judges hold office by what is known as a *quam diu* tenure—i.e. during good behaviour, and not, like ordinary Crown officials, during the pleasure of the Crown. In the case of the judges of the Supreme Court, this final guarantee of independence was introduced by the Act of Settlement of 1700, after the unhappy experiences of the seventeenth century; and it was guaranteed by a further provision which in fact makes it impossible for a judge of that Court to be removed from office except upon an Address to the Crown of both Houses



of Parliament. In the case of the County Court judges, the power of removal (like the power of appointment) is vested in the Lord Chancellor ; but it is expressly confined to cases of inability or misbehaviour.

The position of the persons who preside at criminal trials of minor importance is, in theory at least, very different from that of the judges of the Supreme Court and the County Courts, and very difficult to justify. Except in the cases of recorders and stipendiary magistrates (comparatively few in number), they have not, necessarily, any professional or legal qualifications, they receive no stipends, and (except in the case of recorders) they hold office at the pleasure of the Crown, being appointed by the Ministry of the day. The ordinary Court in such cases consists, as we have seen, of a varying number of Justices of the Peace, or magistrates, with jurisdiction either for a county or a borough. In the case of Petty Sessions, where they sit without a jury and deal only with offences summarily punishable, they are faced with a comparatively easy task. At Quarter Sessions where, in dealing with indictable offences, they are a numerous body directing a jury on questions of law, they get over practical difficulties by electing a chairman who, in fact, acts as presiding judge, though he consults his colleagues on questions of law. In counties where the work is heavy, this chairman is, not infrequently, a barrister of some experience, and may even receive a stipend for the performance of his duties. In one recent case, a county bench of magistrates was so fortunate as to have for its chairman a retired Lord Justice of Appeal of great eminence, who actually served in the chairmanship for twenty years.

But it is, of course, rarely that a magisterial bench can expect such a piece of luck ; and, as has been hinted, the personnel of the lower criminal Courts is (except in the cases of recorders and stipendiary magistrates) very difficult to justify on paper. And indeed, it is hard to doubt the evidence which exists that, so long as Justices of the Peace were chosen practically from a single class,



they were biased by class feelings, and that, so long as they also exercised as many administrative as judicial duties, they found it difficult to distinguish their judicial from their administrative functions. The severance between administrative and judicial bodies effected, first by the Municipal Corporations Acts, and then by the County Councils Act, the steadily increasing practice of appointing as Justices of the Peace persons from all classes of society and both sexes, and the diminution of political influences on appointments, have done much to mitigate the apparent weaknesses of the lower criminal tribunals. It need, perhaps, hardly be stated that, despite his theoretically insecure tenure of office, no magistrate has been dismissed on political grounds, for more than a century ; so that in practice, if not in law, he is as independent of the Ministry of the day as his brethren of the Supreme and County Courts. In fact, like so many other English institutions, the magisterial Benches are illogical, but they work well.

5. The judgment of the Court is spoken in open court ; and, at least where a professional judge is presiding, reasons are given for it. The latter fact is of great importance, on two grounds. In the first place, it has a material influence on the mind of the judge ; for it compels him to justify the conclusion at which he has arrived, by a process of reasoning which will stand the fire of instructed criticism. Whilst he is speaking, his words are being listened to with keen attention, not only by the parties, but by their trained advisers and, quite probably, by many other lawyers. Further, if they are concerned with a novel or interesting case, they are widely reproduced in the lay as well as the legal Press. While a judge cannot openly reply to criticism, he knows that it may affect his reputation and encourage appeals from his judgments. Naturally, he wishes to stand well with that profession of which he was, perhaps at no distant time, a member, and to go down to posterity as a great judge. His judgment is, therefore, more likely to be right when he has forced himself to think out and express a chain of reasoning

which will justify his conclusions, than if he merely delivered his conclusions without explanations.

In the second place, as we have tried earlier to show, it is the reasons of the judges in their judgments, which have built up the Common Law, and which supply the foundations for that structure of precedents which is the framework of the Common Law. If the Common Law is to expand with the requirements of the community, it must be constantly added to by new and powerful judgments, which handle novel circumstances and apply principles to them. A bare announcement of a decision would leave the legal profession guessing at the principles on which it was based, and might well give rise, in addition, to a suspicion of partiality, or, at least, caprice. The reasoning of the Court, embodied in the Reports, becomes the material for the future development of the Law.

6. The sixth rule applicable to substantially all legal proceedings in England is, that there is in effect, if not in name, at least one appeal to a higher tribunal from the final decision of every court of first instance on a matter of law, and to a very large extent on matters of fact. So that the accused person, or, in civil cases, either party, has the right to submit his case to the judgment of at least two tribunals, acting independently of one another.

Great changes in this respect have been made in comparatively recent years. Until the year 1908, it was a general rule that there could be no appeal in a criminal case, though either party to a 'summary' prosecution at Petty Sessions (unless he had pleaded guilty) could have his case reheard at Quarter Sessions; and, in 1848, as we have seen, the Court for Crown Cases Reserved was set up to decide points of law voluntarily reserved by those who tried indictable cases at Assizes or Quarter Sessions. There was also the 'writ of error' in the House of Lords, for mistakes appearing on the record. In 1907, however, was set up the Court of Criminal Appeal, which, as we have said, hears appeals by a convicted person as a matter of course on questions of law arising in all serious

criminal cases, and, as a matter of discretion for the Courts, on questions of fact.

In civil cases, there are even more liberal provisions for appeal. It is quite true that there can, technically, be no appeal from the verdict of a jury on a question of fact; but an application for a new trial may be made, in a County Court case to a Divisional Court, and, in a High Court case, to the Court of Appeal, to order a new trial, on the ground that the trial judge misdirected the jury or that the verdict was one which no honest and intelligent jury could have given on the evidence before it. It is true that the appellate tribunal is, naturally, loth to interfere with the finding of a judge or jury who have seen the witnesses and heard them deliver their testimony. But, in fact, new trials are not infrequently ordered in civil cases; and it is generally regarded as a regrettable omission from the Criminal Appeal Act of 1907, that it did not provide for a similar remedy in criminal cases.

On matters of law, the right of the litigant to appeal in civil cases is liberal, not limited to a single appeal. It is true that an appeal from a County Court cannot go beyond the Divisional Court without leave of the latter or the Court of Appeal; but the litigant in the High Court may appeal, not only to the Court of Appeal, but, if he thinks it worth while, from the Court of Appeal to the House of Lords. Of course we are speaking here of appeals from final decisions, which dispose substantially of the whole case. From interlocutory decisions, as they are called, on points of detail occurring in the course of the proceedings, the right of appeal is more limited.

#### RULES AFFECTING ONLY CRIMINAL CASES

Having now explained the most conspicuous rules which apply to all English legal proceedings, we may turn next to those affecting only criminal prosecutions. Of these we may take as Rule—



7. That before any accused person is actually put to stand his trial on a serious criminal charge, a preliminary enquiry must be held before a magistrate (Justice of the Peace) or magistrates, in order to see whether there is a *primâ facie* case against the accused. It is important to realize, that this proceeding in no essential way corresponds to the preliminary examination of the accused, perhaps arrested on mere suspicion, which is common in Continental procedure. On the contrary, an accused person cannot even be arrested, save in the case of flagrant delict, except on a magistrate's warrant, which can only be granted on information supported by oath. Still more, when he is brought before the magistrate, he can be asked no questions, though he may be represented by counsel or solicitor who may cross-examine the prosecutor's witnesses; and it is entirely at his own choice whether he will put forward any counter-evidence, or merely 'reserve his defence' until the trial. As a matter of discretion, the choice in this matter is, no doubt, frequently of extreme difficulty; but, as a matter of law, the accused's right is unquestioned, and no unfavourable comment can be made on his decision to reserve his defence.

Further, unless the evidence for the prosecution goes so far that the magistrate thinks there is a reasonable probability that a jury might convict the accused, the latter is entitled to be discharged at once; though, of course, another prosecution can then be commenced against him for the same offence, on better evidence forthcoming.

On the other hand, if the magistrate thinks that, on the sworn testimony before him, there is a reasonable probability of the accused being convicted, he orders the testimony of the witnesses to be committed to writing; and these 'depositions' (as they are called) are the evidence upon which the Grand Jury, as explained, decides whether or not to present a 'true bill' against the accused at the Assizes or Quarter Sessions. But at the actual trial, the witnesses, with such others as the prosecution chooses to call, are put again into the witness-box, so that they



may be cross-examined by the accused or his counsel, who, of course, are entitled to call their own witnesses, before the verdict of the Petty Jury is given.

Meanwhile, in the event of a committal for trial, the important question will have arisen, whether in the interval which will necessarily elapse between the committal and the trial, the accused shall be 'enlarged'—i.e. allowed his liberty, or kept in prison. The hardships inflicted on a possibly innocent man by the latter course are so obvious, that the question of 'enlargement on bail,' i.e. on the accused giving security to appear and stand his trial, has long been the subject of acute controversy. It is impossible here to go into details. But, broadly, the right of the accused with regard to bail depends on the nature of the crime with which he is charged. If it is treason, only a Secretary of State or a High Court Judge can grant bail. If it is a felony, or one of a list of indictable misdemeanours, it is a question for the discretion of the magistrate, subject to a right of application to a judge, of which right the accused must be informed by the magistrate. If it is any other charge, the magistrate *must* allow bail; and, if he thinks the accused may disappear, his only remedy is to fix the amount of the bail so high, that the accused will not be likely to be able to secure it, the only restriction on this somewhat arbitrary practice being the vague provision of the Bill of Rights of 1689, that "excessive bail ought not to be required." If an accused person absconds, the recognizances or bonds which have been given to the Crown to secure his bail are 'estreated'—i.e. enforced against the property of those who have entered into them.

Finally, to avoid the oppressive practice of keeping accused persons in custody without bringing them to trial, a section of the famous Habeas Corpus Act of 1679 provides, that a prisoner not brought to trial, at the latest, at the second assizes after his committal, shall be entitled to be discharged from his imprisonment.

Proceedings for minor offences do not involve the lengthy procedure of preliminary enquiry and formal

trial by jury. These are disposed of 'summarily' before two Justices of the Peace (or a single Stipendiary Magistrate) sitting in a regular Court House as a Court of Petty Sessions, whence they are often called by the odd name of 'summary offences.' The proceedings are commenced by a mere summons to appear; and, only if this is ignored, can the accused be arrested and brought forcibly to Court. They proceed in the ordinary course; the witnesses on each side being called, and the parties or their representatives having the right to address the Court. The sentences which may be pronounced by such tribunals are, of course, very much more restricted than those which can be imposed by the Courts trying indictable offences; being in general, limited to a maximum of a year's imprisonment. But there is an interesting class of offences which are, *primâ facie*, only triable on indictment, but which, by reason of special circumstances, e.g. the youth of the accused, the fact that it is a first offence, or the consent of the accused, may be disposed of summarily by magistrates. In these cases, the punishments inflicted may be heavier, though still less than those which a Court trying the cases with a jury might inflict.

8. Though all criminal prosecutions are carried on in the name of the Crown, and, at least nominally, under the directions of the Attorney-General acting through the Director of Public Prosecutions, yet, in fact, criminal prosecutions fall into two great classes, public and private. The former, often called 'police prosecutions,' may vary in importance from cases of murder, or even treason, to breach of mere administrative regulations or local by-laws. The decision to maintain them is taken on grounds of public policy; though, in the case of serious crimes, where the evidence is clear, it follows as a matter of course.

But a very large number of prosecutions for minor offences are, in effect, carried on by, and at the expense of, the parties interested in the alleged offences, either on personal grounds, or from motives of philanthropy or citizenship. And, whatever may have been the old doctrine about the wickedness of 'barratry,' or stirring

up of strife, it has, for a long time been the rule, that any person is entitled, on certain conditions, to use the name of the Crown for the purpose of conducting criminal proceedings. In the case of prosecutions for offences punishable on summary conviction, there is little danger in this practice, owing to the power of the magistrates to award costs to an accused person who has been unjustly prosecuted. Moreover, the nature of offences summarily punishable is not, as a rule, such that an unfounded accusation of having committed one is likely to inflict serious harm on the accused.

But where the offence charged is serious, and involves the publicity of trial by jury, then, undoubtedly, the use of the Crown's name by an irresponsible or malicious prosecutor may place an innocent person in great danger, and, even if he is acquitted, may do him irreparable injury. In such a case, in addition to the civil remedy of an action for Malicious Prosecution, recent statutes have afforded the accused two additional protections.

The first of these is the Vexatious Indictments Act, 1859, which, as amended by various later Acts, provides that no indictment for any of a considerable list of offences shall proceed to trial unless the indictment was ordered by a Judge of a Law Officer, or unless the actual prosecutor has been compelled by the magistrate before whom the preliminary enquiry was held to give security to prosecute and give evidence in due course. This provision is aimed at the cowardly practice of initiating a prosecution and then declining to continue it, thus leaving the accused person without a chance of clearing his character. The second safeguard alluded to seems to have been first given in the year 1867, when, by the Criminal Law Amendment Act of that year, it was provided that, on the acquittal of a person accused of an indictable offence, the Court might order the prosecutor to pay the costs of the proceedings, if it considered the prosecution unreasonable. This wholesome departure from the rule that "the Crown neither receives nor pays costs" was confirmed and extended to other cases by the Costs in Criminal Cases Act,



1908, to which we shall shortly have occasion to refer in dealing with the question of costs generally.

One special rule in connection with criminal prosecutions it seems expedient to mention here. By whomsoever these proceedings are in fact carried on, they can never be withdrawn or compromised without the consent of the Crown. This rule follows logically from the fact that all criminal prosecutions are, technically, 'pleas of the Crown'; and though, especially in summary proceedings, many of which are in effect disputes between prosecutor and accused rather than attempts to punish offences against the community, the rule seldom offered any real difficulty in the way of a compromise, the consent of the magistrate must always be obtained to the dropping of a prosecution. In more serious cases, any suggestion of compromise arouses the vigilant suspicion of the Court: and withdrawal of the charge will only be permitted if the Court is of opinion that the public will not suffer thereby. On the other hand, the Attorney-General can always enter a plea of *nolle prosequi* ('unwilling to prosecute') on behalf of the Crown, even when the prosecution is in fact conducted by a private prosecutor.

Finally, it may be observed that, to make a bargain (even before legal proceedings have been commenced) for concealing, or, as it is technically called 'compounding' a felony, is in itself, not merely an unenforceable bargain, but a criminal offence. Even to advertise a reward for recovery of stolen goods with an intimation of 'no questions asked,' or to take one 'corruptly' for helping to recover such goods while screening the thief, are by statute criminal offences.

9. As a general rule, no lapse of time will bar the right of the Crown to prosecute, at any rate in the case of serious crimes. The maxim is: *tempus non occurrit regi*. In fact, the daily newspapers constantly contain notices of apprehension and trial of accused persons who have succeeded in escaping the vigilance of the law for ten, fifteen, or even more years. The only conspicuous exceptions from this rule are the case of treason, which, unless



it takes the form of a personal attack on the person of the King, or is committed abroad, cannot be prosecuted more than three years after its commission, and prosecutions for blasphemy and certain sexual offences. But, generally speaking, offences summarily punishable can only be prosecuted within six months of their commission.

There is much misapprehension about the so-called seven years' bar to prosecutions for bigamy, i.e. the offence committed by a person who, having a husband or wife living, goes through the ceremony of marriage with another man or woman. All that the bar effects is, that if the accused person can persuade the jury that he or she had not for seven years seen or heard of the missing spouse in circumstances in which, if living, news of that spouse's existence would naturally have reached him or her, then the accused person is entitled to be relieved from the penal consequences of bigamy, though, of course, the second so-called marriage is a nullity.

At the same time, it must be clearly understood that the maxim: *tempus non occurrit regi* is never made, in England, the excuse for protracting criminal proceedings beyond a reasonable and necessary duration. Rarely do the proceedings, even in the gravest cases, extend for more than six months from the apprehension of the accused, while, in the case of offences summarily punishable, the whole business is often concluded in two or three weeks, unless there should be an appeal to Quarter Sessions or a case stated for a Divisional Court, in which events the proceedings may possibly be prolonged up to four months. If the accused were to attempt to prolong them beyond these limits by dilatory steps, he would soon find that, despite the provisions recently introduced on the subject of criminal appeal, his utmost efforts would be unavailing; while if the prosecutor were guilty of a similar attempt, he would find himself faced by the right of the accused, under Habeas Corpus proceedings (later to be explained), to demand either a speedy trial or a liberation. In the only criminal case which, in recent years, has gone to the House of Lords, the whole proceedings, including the

delivery of the judgment of the House, were concluded within eight months of the commission of the crime, though a Long Vacation intervened. It may fairly be claimed for English criminal justice that, whatever may have been its defects in the past, it no longer protracts the agony of a prosecution longer than is absolutely necessary to ensure a patient and satisfactory trial. This creditable result of a long series of reforms is mainly due to the gradual elimination of a series of technical pitfalls which for centuries rendered dangerous and hesitating the footsteps of Justice.

10. Another striking rule of English criminal procedure is, that no accused person can be compelled to criminate himself. This is the very opposite of the inquisitorial systems of many countries, the chief object of which appears to be to extort an admission from the accused ; but it follows logically from the fundamental principle of English Law, that every person accused, either criminally or civilly, of an unlawful act, is presumed to be innocent until he is proved to be guilty. Even the voluntary confessions or 'statements' of an accused person are received with the greatest caution ; and any attempts on the part of zealous officials to entrap a suspected person into admissions of guilt, are sternly dealt with by judges, and their results treated as null. Of course a deliberate plea of 'Guilty' by an accused person at his trial, especially if put forward on legal advice, will not be refused ; but the Court will be reluctant to accept it in serious cases.

Further than this, until quite recently an accused person was not even allowed to give evidence on his own trial, lest under cross-examination he should prejudice his chances of success. He was, on the other hand, allowed to make an unsworn statement, upon which he could not be cross-examined.

By the Criminal Evidence Act of 1898, amid much mis-giving, this rule was altered ; and, for the first time, accused persons were allowed, if they pleased, to volunteer testimony on oath. If they do, they can be cross-examined,

though not (except in certain special cases) to show that they are of bad character or have a criminal record. Moreover, the prosecutor is not allowed to comment on the fact that the accused refuses to take advantage of the new statutory right given to him; though the judge may, if he thinks fit, draw the attention of the jury to it. Finally, not only can the accused's wife never be compelled to testify against her husband, but only in rare cases is she permitted to do so.

11. It was pointed out, in an early part of the present chapter, that the privilege of being represented in legal proceedings by skilled advisers was accorded to every litigant. The chief drawback to this obviously just rule is, that it is of more benefit to wealthy than to poor litigants, inasmuch as legal advice is more easily procurable by those who have means to pay for it than those who have not. Until comparatively recently this objection, though not entirely overlooked, was dealt with only by somewhat inadequate means, such as the 'dock brief' which any counsel present at the trial of an indictable offence could be compelled to accept at the modest fee of one guinea. In the year 1903, however, was passed the Poor Prisoners' Defence Act, which authorizes the magistrates who commit an accused person for trial, and the judge before whom he is tried, to certify that he ought, in the interests of justice, to have legal aid, and that his means are insufficient to enable him to obtain it. Thereupon, the accused is entitled to have counsel and solicitor assigned to him, whose reasonable charges will be defrayed out of the county funds. To a much wider rule, newly introduced by the Costs in Criminal Cases Act, 1908, allusion has also been made. By that statute, the court which tries an indictable offence may direct the payment of the costs of the prosecutor or the accused, or both, out of county funds, and, in addition, may order a convicted person, or, in certain cases, an unsuccessful prosecutor, to recoup such funds the amount which they have been made to pay in respect of his opponent's costs. No costs are, however, allowed in criminal appeals.



12. The last rule of procedure specially applicable to criminal trials that there is room to mention is, that, whilst it is not the practice for the law to fix rigidly the precise penalty to be attached to conviction for each crime, yet it usually fixes a maximum, and frequently also a minimum limit, within which the judge or magistrate must exercise his discretion. We are not here concerned with the objects of punishment, or the different kinds of punishment meted out to offenders against the Criminal Law—about those matters something will be found in a later chapter. Here we are only concerned as to the procedure adopted in fixing the extent of the punishment. And of this we have noticed two points: (1) that the sentence is fixed and delivered by the judge or presiding magistrate (not by the jury), and (2) that, save in a few cases, of which the most conspicuous are treason and murder (where the sentence of death must be imposed), the discretion of the judge or magistrate is limited by fixed boundaries, which, in the majority of cases, are maximum only. It is in the exercise of this discretion that judges and magistrates are placed under one of the heaviest responsibilities of their offices. The circumstances of crimes and criminals differ so enormously, that a rigid scale of punishment prescribed by the legislature would work the gravest injustice. To impose, for instance, the same penalty for stealing a joint from a butcher's shop upon a well-fed loafer who stole merely to gratify his greed or his selfishness, and upon a poor woman who stole to save her child from starving, would be grossly unjust. The law, therefore, while usually placing limits upon judicial discretion in this matter, leaves to it a very wide scope. Undoubtedly, this practice has its dangers, particularly the danger of making the precise extent of the punishment dependent on the disposition, experience, or penetration of an individual judge. And the still unaltered rule, that the duration of the imprisonment which may be awarded for a common law misdemeanour is, technically, unlimited, is also not free from danger; though the danger is reduced by the custom which (as



the writer is informed) almost universally prevails, of limiting sentences of imprisonment to two years, even in serious cases.

### RULES AFFECTING ONLY CIVIL CASES

13. One of the most conspicuous differences between civil and criminal proceedings is, that civil proceedings may be begun without any previous or preliminary enquiry as to the probability of the charges on which they are based being true. Broadly speaking, any person may begin civil proceedings against any other person, without any precautions being taken to see whether his alleged grounds of action are not in the highest degree frivolous and baseless. This feature of civil process is due partly to the obvious fact that, in it, the accuser or plaintiff is not employing the formidable machinery at the disposal of the Crown, but appears and acts in his own name, and at his own risk. It is due also to the more substantial fact that, scandalous as some kinds of civil action undoubtedly are, the odium occurred by meeting them is not, except in rare cases, anything like the odium necessarily incurred by standing one's trial for an indictable offence. On the other hand, the extreme importance of allowing every person who fancies himself aggrieved to air his grievances in a Court of Law, rather than to seek to avenge them by violence, is more of a justification and less of an excuse than the former considerations.

Nevertheless, the law does in some few cases recognize the hardship inflicted on defendants by the bringing forward of baseless claims in civil proceedings. Thus, for example, limited companies whose assets appear to be insufficient to pay the defendants' costs in case they are awarded in the action, may have their proceedings stayed until the company has given security for such costs; and plaintiffs ordinarily resident outside the jurisdiction of the Court (i.e. outside England) may also be ordered to give security for costs. Lunatics and infants can only

sue in the name of their 'committee' or 'next friend' respectively; and the committee or next friend will be liable for the defendants' costs if the plaintiff is ordered to pay them. Finally, in the event of an action or other proceeding being clearly frivolous or vexatious, especially if, after being once or more unsuccessful, the plaintiff renews his attack, the Court will, in the exercise of its discretion, dismiss the proceedings summarily, as baseless. But such cases are very rare.

14. It also follows from the purely private character of civil proceedings, that they can be abandoned or compromised at any time by the parties. The leave of the Court is unnecessary, unless it is desired to make the terms of the compromise and order of Court, i.e. to give it the force of a judgment. Towards such proposals the judge is, as a rule, not merely neutral, but benevolent; and, indeed, he sometimes takes an active part in persuading the parties to compromise their differences. The one outstanding exception to this rule is, that if the judge suspects that the civil proceedings are being made (as they sometimes are) a cloak for 'blackmail,' or other illegal object, he will not only afford no assistance towards a compromise, but will direct the papers to be sent to the King's Proctor or the Director of Public Prosecutions, to enable these officials to inform themselves whether there is any ground for criminal proceedings by the Crown. This is particularly the case in divorce proceedings, which, though technically civil, have some of the attributes of criminal procedure. These will be described in their proper place.

This seems, however, to be the place in which to allude to a question of some practical and theoretical interest in connection with the contrast between criminal and civil proceedings. Suppose an act to be at the same time a criminal offence and a civil wrong. For example, A has met B on a lonely road on a dark night and assaulted and tried to rob him. Clearly A has been guilty both of a criminal offence and a civil wrong. Can B bring his action for the civil wrong before the Crown has prosecuted

A for the felony? It is easy to see how the question arose. Both forms of proceeding are offshoots of the old 'appeal of felony' as it was called; and for centuries they existed side by side without any defined boundary between them. Moreover, the question was complicated by three facts: (1) that, until 1870, if A had been convicted of felony ('attainted' was the word) his goods would have been forfeited to the Crown and his lands would have escheated to his lord, (2) that it was difficult to allow A himself to plead his own turpitude as a defence to a civil action by B, and (3) that English criminal procedure makes no provision for a *partie civile*, as in some Continental systems of criminal law. For these and other reasons, the point remained obscure until recent years. It is now the law that the injured party may proceed with his civil action, and that the defendant cannot plead his own felony as a defence, but that the judge who tries the action, on becoming aware of the facts, ought to suspend the civil action until the Crown has had an opportunity of prosecuting for the felony. The doctrine has no application to the lesser offences known as 'misdemeanours.'

15. Equally in contrast with the Criminal Law are the rules of the Civil Law with regard to loss of rights by lapse of time. We have seen that, broadly speaking, a serious crime can (with few exceptions) be prosecuted at any time, however long, after its commission. The exact opposite is the rule in civil cases. There the rule is that, after a comparatively short lapse of time, a plaintiff who has not enforced his rights is barred of his action, and in some cases, of his substantive rights also. Thus, if a person who is entitled to claim possession of land, either as an owner or a mortgagee (lender), allows twelve years to elapse without bringing an action to enforce his claim, not only will his right of action be destroyed, but, even if circumstances should put him in possession of the land, his former rights of ownership in it will not revive. Moreover, the running of the time continues, if he sells his rights, or if he dies and they pass to his representative.



The purchaser or representative does not have twelve years more, but only so much of the original twelve years as is unexhausted. In the case of personal claims, the 'period of prescription,' as it is called, varies a good deal. The normal period is six years from the time when the claim could first have been enforced. But claims to damages for assault must be brought within four years, claims to a share in the personal property of a deceased intestate within twenty years, claims for slander where the words spoken are sufficient in themselves to give rise to an action, two years, claims against public authorities for acts done in the exercise of their public duties, six months. The old superstitious reverence for a seal enlarges personal claims under deeds (but not claims of title) to twenty years, again calculated, of course, not from the date of the deed, but when performance under it became due.

This last point is important, and sometimes difficult to settle. The test is, as has been hinted: When was the claimant first entitled to bring his action? In the case of contracts, this will be when the first failure to perform any obligation under the contract was made by the defendant. Thus, if I have agreed to repay £100 to A on 1st January two years hence, clearly A can bring no action for the money till that date; and, therefore, the period will not begin to run against me till then. Further, if, after that date, A accepts interest from me in compensation for delay in payment, or if I write to him a signed letter clearly admitting that I owe the debt, but asking for further time to pay, it would be unfair to A that his indulgence should be used against him; and he will have six years from the date of the last payment or admission.

So far there is not much difficulty. But when we leave those civil wrongs which are breaches of contract and turn to the other class, known as 'torts,' then we have to distinguish these again into two sub-classes for the purposes of our present subject. Some acts are torts *per se*, i.e. the moment they have been committed, a cause of action arises for the person against whom they have been com-



mitted ; and his ' period of prescription ' begins to run at once. Thus trespass, infringement of patents and copyrights, obstruction of rights of way, defamation by written words or signs (libel), are all torts *per se* ; and their respective periods of prescription run from the moment that they have been committed, though, of course, if they are repeated, each new repetition is a tort, and gives rise to a further cause of action. But there are other torts which are only torts if and when actual loss follows from their perpetration. Thus, if I have a mine under A's land, I may dig in it till I am tired so long as it does not let down A's surface. But, the moment A's surface begins to sink as the result of my digging, I am liable to compensate him ; and his right of action, and consequently ' period of prescription,' will begin from that date. So in ordinary slander, or defamation by spoken words. This is not actionable *per se* ; but if loss follows to the victim, then the latter's right of action arises from that date.

The only other point necessary to mention in connection with lapse of time is, that the law recognizes certain ' disabilities,' as they are called, which prevent a person taking advantage of his rights of action, and accordingly suspends the ' period of prescription ' till they disappear. Thus, if a person is a lunatic or an infant when a right of action accrues to him, the period of prescription will not begin to run against him until he recovers his sanity or attains full age ; though if the period had begun to run before a person became of unsound mind, he will have no prolongation on the ground of his subsequent insanity. Imprisonment, absence ' beyond the seas,' and coverture (i.e. status of married women) were formerly ' disabilities,' but are no longer so ; though the last has never been expressly abolished.

There are special periods of prescription affecting civil claims by and against the Crown.

16. When we come to deal with the important subject of evidence, we shall see that the liability to give evidence in civil cases is more extensive than that in criminal. Plaintiff and defendant alike are competent and com-

pellable witnesses; and there is no general rule which excuses an unwilling wife from testifying against her husband's or her own wish. Nevertheless, in addition to the general rule that no one can be compelled to answer any question tending to show that he has been guilty of a crime, or to disclose communications made by his spouse during marriage, there are the rules that in proceedings instituted in consequence of adultery, no witness can be asked any question tending to show that he or she has been guilty of adultery, nor will either of the parties to a marriage be allowed to give evidence to prove non-access by one of the parties to the other during the marriage, if the effect of that evidence would be to bastardize a child born during or within a possible time after the marriage.

17. Lastly, the rules on the subjects of assistance to poor litigants, and on the subject of costs, differ a good deal in civil and criminal cases. Putting aside special cases involving the Crown, we may say that it has long been a general rule of civil procedure that "costs follow the event"—i.e. that the unsuccessful party will be ordered to pay the costs of the successful one (as well, of course, as his own), though, even here, the Court may, in its discretion, deprive a successful party of his costs. When the case has been decided by the verdict of a jury, the rule is practically absolute; though, of course, the jury may decide some 'issues' in favour of the plaintiff and some in favour of the defendant, and the burden of costs will be distributed accordingly. Even here, however, the Judge may, for 'good cause,' deprive a successful litigant of his costs.

When the case is heard by a judge or judges without a jury, the Court exercises much more discretion. In such cases, the triviality of the cause of action, extravagance or negligence in conducting the proceedings, the conduct of the parties in the matter which led up to the proceedings, the delay in commencing proceedings, the way in which accounts have been kept, and many other circumstances, may induce the Court to deprive even a

successful defendant (much more a successful plaintiff) of the whole or part of his costs. The most favoured persons in the matter of costs are trustees, mortgagees, and representatives of deceased persons, who are usually entitled to their costs, if successful, against the defeated party, and, even where they are unsuccessful, are entitled to be re-imbursed their costs out of the property of their beneficiaries, debtors, or deceased. But, even here, if such persons have acted unreasonably in bringing or defending proceedings, they may be deprived by the Court of their costs.

No costs in civil cases are chargeable on public funds, except, of course, when they are incurred by officials and public bodies.

Assistance to poor litigants in civil proceedings has recently undergone a systematic treatment. Any person not worth £50 (exclusive of tools, wearing apparel, etc.), or not earning more than £2 a week, may, on proof of these facts, and that he has reasonable cause for taking or defending civil proceedings, obtain a certificate from the Law Society or a Provincial Law Society to that effect, and will thereupon be assigned counsel and solicitor, who will be entitled to make no charge against him except for out-pocket expenses, but who will be under a liability to conduct the proceedings on his behalf. By far the greater number of cases conducted under the new scheme have been matrimonial cases; and special provision has been made in the Rules to enable a wife who seeks relief to get over the difficulty caused by the fact that she may not be directly a wage-earner.

## CHAPTER VIII

### THE ENGLISH LAW OF EVIDENCE

ON more than one occasion it has already been remarked in this book, that one striking feature of English Law is, that it is applied only after a trial in which the conclusions are arrived at from a consideration of the 'evidence'; and more than one of the rules by which the reception and effect of this 'evidence' are controlled have been incidentally mentioned. The subject is, however, of such importance, and the attitude towards it of English Law so characteristic, that a short chapter may well be devoted to a more systematic statement of it.

The ordinary person, who relies upon his own judgment, arrives at the conclusions upon which he acts by a variety of methods. The following of tradition is one of the most powerful; a man will believe a particular kind of food to be injurious and avoid it, because it has long been so regarded in his family. Almost equally powerful is the influence of personal likes and dislikes; a man will believe all lawyers to be rogues because he dislikes one or two of them personally, or all doctors to be genuine and scientific, because he happens to admire three or four of them. Common rumour, or gossip, profoundly influences the conclusions of many people; as, for instance, the lady witness who made grave charges against the military hospitals in the Boer War, and, when challenged to make good her charges, replied triumphantly: "Everybody was saying so." Sheer confusion of thought is also responsible for strange conclusions, as, for example, that of the writer who declared that pirates did not deserve a trial before being executed, because they were enemies of the human race.

It is one of the most striking characteristics of English



justice, that it rejects all these manifestly wrong influences, and, in its investigation of facts, at least attempts to follow the only safe guide, viz. the exercise of reasonable inference, based on the teachings of experience, from other facts testified to by persons whose credibility is secured by certain powerful safeguards, and by documents the authenticity of which is sedulously guaranteed. Needless to say, its methods are far from perfect, and its conclusions sometimes mistaken ; the search for truth is no easy task. But a high, if unattainable, ideal is in some ways better than a lower, more completely attained ; and, in any case, it is infinitely better than no ideal at all.

The administration of justice involves the application of rules of law to certain states of fact. If these facts are admitted by all parties concerned, the case in question becomes a pure question of law, and evidence plays no part in it. But, in the vast majority of cases which come before the tribunals, before the Court is required to consider rules of law, it has first to arrive at the settlement of disputed facts. For example, in a prosecution for arson, the Crown alleges that the accused set fire deliberately to a house with the intention of destroying it. The accused denies the allegation. This is the fact 'in issue,' i.e. the decision as to the occurrence or non-occurrence of which settles the case so far as facts are concerned. If the jury finds in the affirmative, by its verdict of 'Guilty,' all that the judge has to do is to apply the law on the subject of arson to the accused.

Now it is quite possible, though not likely, that, in the case put, the Crown may be able to call credible witnesses who actually saw the accused deliberately set fire to his house, and that the jury may believe their testimony. In that event, the accused is said to be convicted on 'direct evidence' ; and such evidence is, undoubtedly, the most satisfactory that can be given. It was, probably, a misguided perception of this truth which, after the decay of the belief in ordeals, i.e. direct appeals to the judgment of Heaven, induced the tribunals of the Middle Ages, in so many cases, to apply torture as a means of

inducing the accused to confess, and thus supply direct evidence of his own guilt. Of course their mistake was to suppose that the application of physical torture would elicit the truth. It usually produced the answers which the victim believed his torturers to desire.

Happily, English tribunals, with one or two conspicuous exceptions, avoided this ghastly error of applying torture to elicit confession, and thus saved countless English folk from suffering and injustice. And, if we compare the tribunals whose history is free from the stain of torture with those which labour under it, we shall probably not be long in guessing the reason for the difference. The Common Law courts used trial by jury; they did not use torture. The Court of Star Chamber and the Court of Chancery knew no jury; torture was in regular use in the former and was occasionally practised in the latter. The conclusion is evident. One of the great benefits conferred upon the country by the jury system, despite its imperfections, is, that the annals of English justice are more free from instances of the use of torture than those of any other country in the Old World. To what purpose produce before a jury a man from whom confession had been extorted by the use of the boot and the thumb-screw? The jury would not believe him.

But it is, of course, very rarely that a fact in issue can be proved by direct evidence, at any rate in criminal cases. Criminals, as a rule, are not anxious to secure the presence of independent witnesses when they commit their crimes. On the contrary, in a country in which justice is vigorously administered, they take care to cover up their tracks as carefully as possible, and to conceal all traces of their doings. In civil cases, the motives for secrecy may be different; but in them also the proof of facts in issue by direct evidence is somewhat rare.

The consequence is, that, in the great majority of cases (especially the more serious cases) which appear before the English Courts, the facts in issue have to be proved by 'indirect' or, as it is technically called, 'cir-

cumstantial' evidence, i.e. evidence of facts not 'in issue,' from the existence of which the facts in issue may be inferred. The former class of facts, though not themselves 'facts in issue' are said to be 'relevant to the issue'; and upon the existence or degree of relevancy of a particular fact, proof of which is offered, turn some of the most difficult questions of the Law of Evidence.

It is, in a sense, doubtless true, that every fact and event are relevant to every other fact and event. The universe, as we know it, is so intimately knit up in all its parts by the great law of cause and effect, that a complete account of the origin and existence of any fact would involve a tracing of universal history from the earliest times to the present day. But, obviously, no Court of Justice could do its work if the full implication of this truth were followed. Nor would it be easy for a legislature to lay down any general rule as to the degree of relationship to the facts in issue which would make any fact proposed to be proved admissible. As an inevitable consequence, the judge is left to his own discretion as to admitting evidence, subject to certain negative rules prohibiting the proof of certain facts, to the powerful influence of tradition, to the circumstances of the case, and to the arguments or reputation of the counsel engaged. Thus, while facts clearly showing motive and preparation for, or explanation of, the facts in issue, would readily be admissible; beyond these, admission of testimony remains, as has been said, very much a matter of discretion with the judge.

But if we look at three conspicuous examples of facts which may not be given in evidence, it is possible that the consideration which has most influence upon the exclusion of testimony will appear.

Thus, for example, if a person is accused of a particular crime or tort, facts may not be given in evidence to show that he had previously committed such offences. To the layman this may seem at first strange reasoning; but reflection will show that a contrary rule would imply the uncharitable view that, because a person has once been



guilty of a particular offence, therefore he must be presumed to have committed it again whenever he is accused of so doing. The limited exception in the case of the person accused of receiving goods knowing them to have been stolen has been previously alluded to.

Again, no facts may be proved merely to show that an accused person is of general bad character, or comes of a bad stock, or from evil surroundings. Still less may testimony to the frequency in the neighbourhood, or at the time, of offences similar to that of which the defendant is accused, be given; for there is, clearly, no proximate connection between such facts and the guilt of the defendant. By a parity of reasoning, it might just as well be urged that the accuser himself, if he lives in the same neighbourhood, is a likely person to have committed the offence.

Manifestly, the guiding rule which determines the law to exclude these three kinds of facts, is the apprehension lest the accused should be prejudiced in the eyes of the jury, and thus fail to secure an impartial trial; while the probability rationally to be attributed to the inference suggested is so small, as not to justify the danger of a miscarriage of justice.

On the other hand, when the circumstances of the case suggest a real connection between the facts tendered and the facts in issue, then the former, however at first sight irrelevant, are not excluded. A striking and apparently severe application of this principle is the well-known rule, that, when once the existence of a conspiracy, or common illegal action, between two or more persons, is established, then every act (including speaking and writing) done by any one of them in execution of the common purpose may be proved as a relevant fact against any of the others, and is, indeed, to some extent at least, considered to be the act of each.

Finally, on the question of relevancy, it must be borne carefully in mind that it is facts, and facts only, which can be evidence, and, therefore, relevant to the facts in issue. Opinions are not evidence. It may be said, of



course, that the fact that A holds a certain opinion is as much a fact as that A is six feet high. No doubt that is true ; and the fact that a person holds a certain opinion may be given in evidence, e.g. in libel and slander cases. But that does not make the opinion evidence against the accused. It may be a fact that A thinks B a thief. But that is no proof that B is a thief ; and, therefore, the fact that A holds such an opinion is deemed to be irrelevant to the issue : whether B is a thief. The great apparent exception to this rule is, it is submitted, less an exception than it looks. The 'scientific witness' is allowed to state his opinion as to how a certain person met his death, or why a certain building collapsed ; and it is said that these opinions may be given in evidence. After all, does that amount to more than saying that, when it is attempted to prove the existence of certain obscure but highly relevant facts, the testimony of the expert witness is, naturally, regarded as of special value to determine the existence of those facts. It is the facts pointed out by the expert, not his opinion of the facts in issue, which ought to guide the jury in arriving at their conclusion.

The second great principle of the English Law of Evidence is, that relevant facts can only be proved by testimony given orally in open Court, under apprehension of punishment for perjury if the witness knowingly gives false testimony, and subject to cross-examination by the opposing party or his counsel, or by authentic documents coming from the proper custody.

The first part of this rule has been before referred to ; but its importance warrants a more detailed insistence upon it. It will be observed that the rule imposes no less than three safeguards upon the testimony of witnesses. First there is a publicity, which, though, perhaps, in modern conditions less effective than formerly in small communities where the speech of each member was soon known to all, yet, through the agency of the Press, may be carried to the ends of the earth, and provoke a refutation. It is true that this safeguard is not invariably applied. Thus, for example, what are called

the 'interlocutory' or preparatory steps in a civil action may be taken on evidence given by what is called an *affidavit*, i.e. a written statement sworn to or affirmed, but not read by the witness in open Court. Also witnesses too ill or infirm to attend the Court, may, after notice to the other party, be examined, in criminal cases, in their own homes in the presence of a magistrate, and the depositions given by witnesses at a preliminary enquiry before the magistrates may be read at the trial, if the witnesses have died in the meanwhile. And, in civil cases, witnesses living outside the jurisdiction may be examined 'on commission,' i.e. by a person or persons appointed by the Court for the purpose.

Secondly, there is the safeguard of apprehension of punishment in the event of giving false testimony. This apprehension was for long supposed to be secured by compelling the witness to take an oath, or appeal to the Almighty to visit him with pains and penalties if he swore falsely; and this practice is now voluntarily followed in the majority of cases. For those who object to take this or any form of oath, the alternative of solemn affirmation is now admitted; but the legal penalty for wilfully making a false statement material to the proceeding (or, which is the same thing, making a statement which the witness does not believe to be true) applies equally to each class of witness, and may be as high as seven years of penal servitude. But of this we shall say more in dealing with the offence of Perjury.

Thirdly, the evidence of a witness in a judicial proceeding is safeguarded by the powerful test of cross-examination. That is to say, when he has finished his examination-in-chief, conducted by his own counsel or the counsel of the person for whom he appears, and, naturally, administered (in most cases) in a friendly spirit, his opponent's counsel may ask him any manner of question that he (counsel) pleases, not merely on his evidence-in-chief, but on any fact relevant to the issue, however apparently remote. Further than this, his opponent's counsel may examine him 'as to credit,' i.e. with a view to showing

that he is not a credible witness ; and, for this purpose, counsel may ask him any question tending to throw discredit on his character or life, and, subject to the privileges or exemptions already mentioned (incrimination, professional privilege, interests of the State and especially the administration of Justice), the witness must answer such question, on pain of being committed to prison for contempt of Court if he refuse. It is obvious that this power vested in his opponents' counsel must deter many a valuable witness from voluntarily coming forward with his testimony ; but it has long been established, that any litigant, whether in a criminal or a civil matter, can compel the attendance of any witness resident within the jurisdiction, by the simple process of handing him a copy of a *subpoena* or judicial summons, procurable as a matter of course, and paying him 'conduct money,' i.e. sufficient travelling expenses. On the other hand, the witness is absolutely immune from all proceedings (except, of course, for perjury) in respect of testimony given by him having reference to the issue in the case.

At one time there were numerous rules which restricted the competence of persons to be witnesses. The parties and their relatives and any one interested, however remotely, in the result of the proceedings, were excluded. By various statutes, these disabilities have been removed ; and now, in substance, any person capable of understanding the consequences of committing perjury is not merely a competent but a compellable witness ; the only important exceptions being the cases before noticed, viz., that no person accused of a criminal offence can be compelled to testify, and that a husband and a wife can never be compelled, nor indeed, in most cases are they permitted, to give evidence against one another in a criminal prosecution.

Unlike many systems of law, the English, in the vast majority of cases, leaves the weight of a witness' testimony to the discretion of the jury controlled by the direction of the judge. Only in the two cases of treason and perjury is there any rule as to more than one witness being necessary



to establish a fact. Even the unsupported testimony of an accomplice can be regarded as sufficient to prove the commission of a crime ; though in such a case it is the duty of the judge to warn the jury that it is unsafe to convict upon such evidence alone. In cases of actions for breach of promise of marriage, and applications for affiliation orders, the plaintiff or applicant cannot succeed unless her evidence is corroborated in some material particular ; but this corroboration need not necessarily take the form of a second witness. Even the unsworn testimony of a child too young to understand the nature of an oath, but old enough to know that it is wrong to tell a lie, may be received ; but here again, no person can be convicted upon such testimony unless it is corroborated by other material evidence implicating the accused.

Thirdly, one of the most important rules of evidence in English Law is, that witnesses must speak only to facts of which they have direct knowledge. This rule is frequently stated in a popular form in the maxim : “ Hearsay is no evidence ” ; but it may well be questioned whether this form has not given rise to more misunderstanding than it has removed. Of course a witness in a case may, and does, every day, repeat words heard by him. For instance, in a case of assault, where the assault was denied, the testimony of a bystander who heard the accused say : “ I’ll smash your —— face in,” would be most material. What is meant by the maxim is, that the mere repetition of a statement by another person who heard it is no proof that the statement is true. Thus if A states in the witness box that he heard B say that he saw C knock D down, that would be direct evidence that B made the statement, but not evidence at all that C did knock down D. The reason is quite simple. Unless B himself goes into the witness box and makes his statement, it rests only on his unsworn statement, unguarded by the three essential tests of public delivery in Court, liability for the penalties of perjury, and cross-examination. There are, however, a few important exceptions to the rule that hearsay is not evidence.



First, there are what are known as 'dying declarations,' i.e. statements made by a person under apprehension of immediate death, as to the cause of his death. Here it is assumed, probably with correctness, that the circumstances of the case are sufficient guarantee of the truth of such a statement, without the usual safeguards. But such statements are only admitted in trials for murder or manslaughter; and it may well be doubted whether the assumption which is held to justify their admission is really well-founded, unless it can be justified under the next exception.

Secondly, there is the exception intended to be described by the somewhat ambiguous expression '*res gestae*.' It is said that, whenever any act may be proved, statements and acts accompanying and explaining that act, made or done by or to the person doing it, may be proved, if they are necessary to enable it to be understood. So stated, the rule appears really to be a particular example of relevancy; but the application of it is justified in so many different ways, and its limits appear to be so little fixed, that it seems hardly suitable, in a book like the present, to discuss it further.

Thirdly, declarations, written and oral, made by deceased persons in the course of their duty, and against their own interest—for example, admissions by a deceased cashier or collector of the receipt of certain sums of money—may be admitted as evidence to establish facts in favour of other persons. So also may statements made, even by living persons, in the course of official duty; and, finally, in cases seeking the establishment of family pedigrees or public rights such as rights of passage, mere reputation or common rumour may be admitted for what it is worth. It is in such cases that the 'oldest inhabitant' is a familiar figure as a witness.

The last rule of the English Law of Evidence to which it is necessary to refer is probably derived from that just considered; but, by the nature of the case, it is applicable only to documents, and is, therefore, conveniently treated separately. It is known as the 'best evidence' rule;

and it has two important applications, which are really quite distinct.

In the first place, the rule demands that whenever a document is put forward as supporting the assertion of a litigant, the original of that document, not merely a copy or oral evidence of its contents, must be produced. Possibly this rule goes very far back in the history of English Law, when documents were rare and mysterious things, and their *profert*, or actual production in Court, was necessary if they were pleaded. This reason has long since ceased to be effective ; but more modern and practical considerations have come to support the rule. One is due to the fact that most legal documents involve payment of stamp duties before they can be given in evidence ; and absence of the original document (which should bear the stamp) naturally arouses suspicion in the mind of the judge that the revenue has been defrauded. Then again, certain famous statutes to which reference will be made in due course, require, as a condition of certain transactions being legally enforceable, that a memorandum of their essential terms shall be put into writing " signed by the party to be charged therewith or his agent." And absence of the original memorandum renders it doubtful whether these provisions have been complied with.

A different application of the rule is that which lays it down that, if the parties to a transaction have embodied their intentions in a document, then no extrinsic evidence (especially oral evidence) can be admitted to vary or contradict the terms of such document, or to show that it does not represent the full intentions of the parties.

In view of the fact that writing, especially if made contemporaneously with the events which it professes to describe, is, in many ways, a much more trustworthy record of such events at a future time than the memory of witnesses, the rule appears to be eminently wholesome and prudent. But it has been found impossible to apply it in its integrity ; and there is not now very much of it left.

In the first place, where a transaction is not required by law to be reduced to writing, it seems hard to penalize a party for only putting part of the transaction in writing, when, if the rule were strictly enforced, he had much better not have had any writing at all. Accordingly, it has been held that, in such cases, terms and conditions supplementary to, but not inconsistent with, the documents, may be admitted to oral proof; unless it is clear that the parties have intended to put the whole transaction in writing.

Again, where it is alleged that the transaction was procured by the fraud, misrepresentation, or undue influence of one of the parties, or that it contemplated an illegal object, it is manifestly contrary to public policy that oral evidence should not be admitted to impugn it; and in some such cases even the Common Law Courts, and in all such cases Courts of Equity, at an early date, allowed proceedings to set aside such transactions, even though embodied in documents apparently innocent.

Finally, where, by a mere mistake of transcription, or omission, the document actually misrepresents the intentions of the parties, then Equity, with due reserve of the interests of innocent third parties, will rectify the document so as to make it represent the true intention of the parties; and, to enable the Court to do this, will admit oral evidence of such intentions. But here a curious difficulty sometimes arises. If the transaction really envisaged by the parties did not require embodiment in a document to make it legally enforceable, then the rectified document can be enforced. But if it did, and the variations necessary to rectify it can only be proved by oral evidence, then the rectified document cannot be enforced; because to enforce it would violate the provisions of the statute requiring such transactions to be embodied in writing before they can become enforceable. The only thing to be done in such a case is to set aside the transaction altogether, unless both parties will agree to carry it out in the terms actually agreed upon.



## CHAPTER IX

### LEGAL PERSONS

LAW, in the sense of the jurist, being a moral force, can only act through persons, that is, beings capable of exercising rights and of being subject to duties. The law of the jurist differs from the law of the exponent of physical science in no way more conspicuously than this, that it is incapable of acting directly on inanimate objects. Nor can it act directly even on animate objects, unless they are human; because the brutes, though they can, to a certain extent, be taught to regulate their conduct according to the wishes of their masters, are incapable of appreciating the claim of society to control the conduct of its members. Consequently, it is only human beings who can be directly affected by the laws of the jurist; though inanimate objects and animals can be affected by such laws through the agency of human beings. Thus a law requiring a road to be kept in repair, and a law directing dogs to be muzzled, cannot be enforced directly on the road or the dogs; it can only be enforced through the agency of human beings.

To human beings regarded as the bearers of rights and duties created or imposed by English Law, that law gives the convenient, though not, perhaps, very intelligible name of 'persons.' For the most part, a 'person,' in the legal sense, is just the ordinary human individual who is a familiar object of the street and the market-place. And, for the most part also, owing to the democratic tendencies of recent times, especially in England, English Law assumes generally, that all individuals are equal in its regard, or, as it is frequently put, "the law is no respecter of persons." But, in spite of this claim, every civilized society, however equalitarian in theory, is bound to recog-



nize certain natural 'disabilities' as they are termed, i.e. facts which render it morally impossible to treat certain classes of individuals as normal persons. No society, for example, however democratic, could treat a child two years of age, a born idiot, or a condemned felon, as a normal individual; though human societies have different ways of dealing with such abnormal persons. Finally, in nearly all civilized societies, for reasons of convenience, it has been found necessary to treat certain groups of individuals, for certain purposes, as persons. These groups are sometimes spoken of as 'artificial persons'; but the expression is not happy, for it suggests that the legal personality of the ordinary individual is 'natural,' which is very far from being the case. The French expression, *personne morale*, is hardly better; for that again suggests that the ordinary individual is not a *personne morale*. The familiar English term for the group-person is 'corporation'; and, in spite of some objections to it, it is probably the least misleading term of those in familiar use. Inasmuch as the legal position of the normal individual will appear at large in the contents of this book, this chapter will resolve itself into an attempt to explain the peculiarities of the position of the abnormal person—individual or group—or, as it is frequently called, the Law of Status.

The word 'status' itself originally signified nothing more than the position of a person before the law. Therefore, every person (except slaves, who were not regarded as persons, for legal purposes) had a *status*. But, as a result of the modern tendency towards legal equality formerly noticed, differences of *status* became less and less frequent, and the importance of the subject has greatly diminished, with the result that the term *status* is now used, at any rate in English Law, in connection only with those comparatively few classes of persons in the community who, by reason of their conspicuous differences from normal persons, and the fact that by no agreement of their own can they get rid of these differences, require separate consideration in an account of the law. But professional or even political differences do not amount

to *status*; thus peers, physicians, clergymen of the Established Church, and many other classes of persons, are not regarded as the subjects of *status*, because the legal differences which distinguish them from other persons, though substantial, are not enough to make them legally abnormal. And landowners, merchants, manufacturers, and wage-earners are not subjects of the Law of Status, though the last-named are, as the result of recent legislation, tending to approach that position. We deal very shortly with the most conspicuous cases of *status* in English Law.

1. *Infants*.—Avoiding the fine shades of distinction familiar to the classical Roman lawyers, English Law fixes the termination of infancy both for males and females on the day before an individual's twenty-first birthday, and treats him from that time as a fully responsible and capable citizen. But it must not be assumed that before attaining that age, an individual has neither rights nor duties. On the contrary, he may be said to have full rights. He may acquire and alienate property, enter into contracts, commence and carry on (through a 'next friend' who will be responsible for costs to his opponent) all kinds of legal proceedings. He cannot, however, make a valid testament, except in certain special circumstances; and there are certain important political rights, such as the exercise of the Parliamentary and municipal franchises, which are denied to him. He has even the very exceptional right of cancelling, within a reasonable time after attaining his majority, any civil transaction entered into by him during his minority, though the other party to the transaction has no corresponding right. There are, however, one or two important exceptions from this very valuable privilege. Thus, an infant will be bound absolutely for liabilities incurred by him for 'necessaries,' i.e. goods and services required to maintain him in health, education, and comfort in accordance with his social station; and he will be bound by a marriage settlement of his property made by him with the approval of the Court.

On the other hand, the liabilities of an infant under the Criminal Law and some parts of the Civil Law are considerable. Though deemed incapable of criminal liability up to the age of seven, and between the ages of seven and fourteen only liable if proved to be *doli capax*, i.e. of knowing that what he was doing was wrong, yet, after fourteen, he will be fully answerable for all offences against the Criminal Law, whilst, in theory at least, he is from the earliest age responsible for all offences against the Law of 'Torts,' i.e. such civil offences as are not mere breaches of contract. He can also at the age of fourteen years (twelve if a female) enter into legally binding marriage, subject to certain limited rights of restriction vested in his parents or guardians, which will be discussed in their proper place. But, in addition to his right to repudiate contracts, previously alluded to, an infant is by statute (the Infants Relief Act, 1874) rendered absolutely incapable of binding himself by contracts for the repayment of money lent or for goods supplied (other than necessities); and no ratification of any contract made by an infant, nor any promise to pay any debt contracted during infancy, will be legally enforceable, even though such ratification or promise were made after attainment of majority.

2. *Persons of unsound mind.*—It is, probably, true to say, that there is no definite *status* of lunacy or idiocy according to English Law. But from early times the Crown has exercised a control over the persons and property of born idiots and persons formally found to be lunatics by the inquisition of a jury, which, in effect, removes them to a great extent from the sphere of the ordinary law. In a well-known case decided in 1904, it was laid down by the Court of Appeal that any attempted alienation of his property by such a person during his lifetime was absolutely void; and there can be no doubt that any charge of crime against such a person would be met by a defence of 'unfit to plead,' and that thereupon the accused would be detained in custody till he died or recovered his reason.



With regard to lunatics 'not so found,' the position is more difficult. The general principle in civil matters is, that persons dealing with them in good faith and for valuable consideration (i.e. pecuniary bargains) are protected, and that, in order to escape liability on an alienation of property or a contract, the lunatic or his representative must show, not only that he was incapable of understanding the bargain, but that the other party was aware of the fact. Unfortunately, the cases do not appear to decide whether this protection of innocent dealers extends to the cases of lunatics 'so found'; but the language of the Court in the case of 1904 (above referred to) implies that it would not, and indeed it is difficult to see how any one could deal with a lunatic 'so found' without being aware of the fact. And the gifts of a lunatic, whether 'so found' or not, will always be set aside, even against persons who, in good faith, have subsequently acted upon them to their detriment. Moreover the marriage of a person who, from mental incapacity, was unable to understand the nature of the transaction, is wholly void, even though the other party was unaware of the defect in his understanding. On the other hand, the testament of a person of unsound mind, even of a lunatic 'so found,' is valid, if the testator understood what he was doing and its consequences. In fact, the will of the lunatic in the case above mentioned of 1904, though actually made in a lunatic asylum, was admitted to probate after her death.

The position of the lunatic 'not so found' in Criminal Law is somewhat different from that of the lunatic 'so found.' His advisers may put up the defence of 'unfit to plead,' in which case a jury will be impanelled to try the truth of the plea. If the jury find the plea proved, the same result follows as in the case of the lunatic 'so found'—i.e. the accused is ordered to be detained in custody. Or insanity may be set up as a defence, in which case the jury may find the accused: "Guilty, but insane" (i.e. at the time when he committed the crime); and thereupon he will be sent to an asylum for criminal lunatics.



Finally, an accused person may after conviction become insane, in which case he may also be removed to such an asylum. Sentence of death will not be executed upon an insane person.

Apparently, lunatics, like infants, are, in theory, fully responsible for the consequences of torts (i.e. civil wrongs not being breaches of contract) committed by them. But of course, in cases in which a special intention is necessary to the commission of a tort, e.g. Malicious Prosecution or Civil Conspiracy, the state of the defendant's mind would be material.

3. *Convicts*.—The property of persons under sentence for felony is vested in administrators appointed by the Crown; and the convict can neither bring actions nor alienate any of his property, nor enter into contracts, until his sentence expires or he has received a pardon. On the other hand, proceedings may be conducted against him, and orders and judgments against him for the recovery of money may be enforced against his property in the hands of the administrator. He is disqualified for holding various offices and preferments, and will be deprived of those which he was holding at the time of his conviction. On the other hand, a testament made by a convict is valid, even though he should die before recovering his freedom; and his property is restored to him after his release.

4. *Aliens*.—In dealing with the Crown and its Subjects (Chapter X) we shall discuss the question of who are British subjects; and we shall then realize that there are at any time resident in or passing through England a large number of persons who are not subjects of the Crown. These persons are known as 'aliens'; and, though they are bound by the obligation of local allegiance to respect and obey the English Law, they have not all the rights under that law of British subjects. At one time, indeed, their disabilities were numerous; but by recent legislation they have been placed almost on the footing of British subjects so far as private law is concerned, and it has even been held that they are entitled to that peculiarly

valuable safeguard of the liberty of the subject, the writ of Habeas Corpus. But they are not qualified to hold any office, or to exercise any Parliamentary or municipal franchise, or to own any British ship. And, of course, the position of an alien at once alters if the country of his nationality is engaged in war with the British Empire. He then becomes, in theory, a rightless person; though the full consequences of this theory are seldom visited upon him, unless he manifests personal hostility inconsistent with his local allegiance. Aliens, after ten years' domicile in England, are entitled and liable to serve on juries; but their presence may be challenged by any party. Formerly, an alien was entitled to be tried, on a criminal charge, by a jury composed half of British subjects and half of aliens (*de medietate linguae*). But this privilege has now been abolished.

5. *Bankrupts*.—An individual declared (or adjudicated) bankrupt, i.e. unable to pay his debts, is under various disabilities or disqualifications, which mark him out as an abnormal person. His property, whether acquired before or since his adjudication, is vested in a trustee, who administers it for the benefit of his creditors; and he can therefore neither alienate nor charge it. Though he is not legally incapable of entering into contracts, he is liable to penalties if he conceals his position; and, as his new creditors will have no effective claims against his property, the chances of any one being found willing to deal with him are small. He is legally disqualified for five years from being a member of Parliament, and many other public bodies. On the other hand he remains, of course, fully responsible, so far as his person is concerned, to all the requirements of the law, criminal or civil.

### MARRIED WOMEN

Until the middle of the nineteenth century, the *married woman* continued, despite the substantial improvements in her position effected by Courts of Equity, to be one of

the most conspicuous examples of *status* in English Law ; and, despite the immense changes in her position effected by recent legislation, some of her former privileges and disabilities survive. But these are now so few as to be inadequate to impose upon her the conspicuous position peculiar to *status*, and will best be pointed out in dealing with the various parts of the law in which they occur. Generally speaking, a married woman is as free as a man or a single woman to acquire and alienate property, to enter into contracts, to serve in public office, to exercise political and other franchises, and to claim the various legal rights of a British subject. On the other hand, she is nearly, though not quite, subject to all the liabilities, criminal and civil, of her unmarried sister, or her husband. She can no longer be ranked as an abnormal person in the eye of the law. There remains but one other, and that, perhaps, the most important example of *status*, viz.—

6. *Corporations*.—As was stated at the beginning of this chapter, the root idea of a corporation in English Law is, that it is a group of individuals which is, for many purposes, treated by the law as one person, and, moreover, a totally different person from the individuals who are its members. This idea is by no means easy to grasp ; and, as a matter of fact, it took English lawyers, and, still more, the English public, several centuries of struggle and doubt to arrive at the firm conclusion held to-day. Two examples taken, the one from the early days of the struggle, the other from a recent date, will illustrate, more clearly than pages of description, the difficulties which have been overcome in arriving at the modern firm distinction between the corporation and its members.

In the year 1429, an action was brought against the Mayor, Bailiffs, and Commonalty of Ipswich and one J. Jabe (presumably an official of what we should call the ‘corporation’) for trespass in respect of the seizure of the plaintiff’s beasts for non-payment of toll. Apparently, the facts could not be disputed, for the defendants’ counsel resorted to a plea which was of the most technical kind, but not the less interesting on that account. He



pleaded that, inasmuch as the defendant Jabe was a member of the 'commonalty' of Ipswich, he had been named twice over in the writ commencing the action, which was, therefore, bad. Presumably, if Jabe, instead of being sued with the corporation, had been prosecuted by it for stealing the 'corporation plate,' he would have set up the plea that, being a member of the corporation, he could not be convicted of stealing 'his own' plate. Absurd as the plea sounds to us, it obviously bothered the Court no end; for the report of the case in the Year Books drags on till it appears to have been given up by the reporter in despair. Now contrast the difficulty of 1429 with the case of Mr. Aron Saloman in 1892.

In the last-named year, Mr. Saloman transferred the whole of his business, for a large sum, to a company which had been formed by him for the purpose. The company was registered as 'Aron Saloman and Co., Limited.' There were, nominally, 40,000 shares in the company; but only 20,007 were issued, of which Mr. Saloman himself held 20,001, while the remaining six were held by his wife and children. Mr. Saloman himself and two of his sons were the directors of the company. It is hardly uncharitable, therefore, to assume, that Mr. Saloman retained a good deal of control over the company to which he had sold his business. Furthermore, he had obtained from the company 100 debentures of £100 each, as part payment of the purchase-money for his business, which made him a secured creditor of the company to the extent of £10,000. In the following year, the company duly failed; and an order for its winding-up was made by the Court. The total assets realized for payment of its creditors were less than £10,000; and Mr. Saloman claimed that the whole of the amount realized should be paid to him, as a secured creditor. The unsecured creditors, on the other hand, alleged that the company was Mr. Saloman, that he was really their debtor, and that, if he were allowed to walk off with the whole of the assets, he would be virtually annexing their money. To the layman, such an allegation hardly sounds un-



reasonable ; but, after prolonged litigation, the House of Lords decided that Aron Saloman and Aron Saloman & Co., Limited, were distinct persons, and that the former was a secured creditor of the latter, and, therefore, entitled to the whole of the assets in priority to the unsecured creditors.

It is hardly necessary to point out that this distinction between the personality of a corporation and the personality of its members is of immense importance in the world of affairs, which could, indeed, at the present day, hardly get on without it. It would be clearly impossible for many of the vast and long-enduring enterprises of modern life to be carried on by the efforts of individual human beings, associated merely by agreement. The resources of the average individual are limited ; even a millionaire could hardly carry on unaided the business, for example, of a great railway company. A century is, even now, a liberal allowance for the lifetime of an individual ; and if, at the death of every member of a group of associates, the whole business could be disturbed by the withdrawal of his capital, the enterprise would speedily come to an end. Under the protection of the corporation-theory, enterprises such as universities, churches, trading companies, municipalities, and the like, can, and do, flourish for centuries, having ‘perpetual succession,’ undisturbed by the deaths or withdrawals of their members. Finally, though this is a somewhat late development, by the recognition of the principle of ‘limited liability,’ individuals are encouraged to find money for commercial and industrial ventures too risky to warrant the embarkation of their whole fortunes ; and, though this principle is open to abuse, there can be no doubt that its abolition would be a severe blow to commercial and industrial enterprise. These are but a few of the advantages of the corporation system. Let us now look at one or two of its more conspicuous features in English Law.

One of the most striking of these is the rule, that no corporation can be formed except under the authority of the Crown. This rule, which has been steadily insisted

on by English Law for at least six centuries, is, doubtless, due, historically, to the natural jealousy of the State towards associations which may possibly defy its authority. It first manifested itself in the practice of granting Crown charters to bodies like city gilds, universities, and other groups, which thereby acquired the character of persons who could sue and be sued, acquire and dispose of property, make by-laws, exercise franchises, and the like. As a matter of fact, a few very ancient corporations never have had charters of incorporation; and for these English Law, with its wonted common-sense, has found a niche as 'corporations by prescription,' based on the fiction of lost charters. Later on, though the Crown prerogative of creating corporations by charter has never been given up, it became desirable, for 'quietening of doubts' about monopolies, limited liability, and the like, for the Crown's authority to take the form of an Act of Parliament; a notable instance being the ordinary joint-stock commercial company, which is registered automatically (and thus acquires corporate character) on complying with the requirements of the Companies Acts. Or, finally, there may be a combination of the older and the newer methods, as, for instance, in the case of municipal corporations, which receive Crown charters under the Municipal Corporations Act, which, for the most part, regulates their actions.

Again, although a corporation is a 'person' in the eye of the law, it obviously differs from an individual human being in several ways. A corporation, as such, cannot marry a wife, make a will, eat a dinner, or commit an assault or any other crime requiring a special intention; though, of course, its members can, in their individual capacity, do all these things. This is, no doubt, the reason why corporations are often spoken of as 'artificial' or 'fictitious' persons; and it is important as having given rise to the doctrine of *ultra vires*, which plays a great part in the Law of Corporations, and about which a few words must be said.

For, quite apart from the question of what a corporation

can, by its very nature, do or not do, there arises the more important question : how far a corporation should be allowed to engage in enterprises which, but for legal restraint, it would be capable of undertaking. Ought, for example, a municipal corporation to be allowed to gamble on the Stock Exchange, or, more practically, to run steam-boats or supply gas and water ? Is it desirable that municipal authorities should use the ratepayers' money in that way ? Or, again, if a company is formed to trade in building materials, is it desirable that it should be allowed to build blocks of flats with its capital, and let them to tenants ? Such questions are of great practical importance ; and the answer that English Law gives to them is, briefly, as follows.

So far as corporations created by charter or prescription are concerned (often called 'common law corporations') the law takes a liberal view, viz. that such corporations may engage in any enterprises which are not manifestly inconsistent with the purposes for which they were, or are assumed to have been, created. Thus, for example, an university, especially an ancient university, may do many things which, though not strictly a part of its primary objects of promoting religion, education, and research, can be regarded, on a general construction, as sub-serving these ends. Thus, unless restrained by statute, it can speculate in land purchase, organize congresses and entertainments, establish systems of pensions and retiring allowances, invest its money in various kinds of commercial securities, purchase objects of art to decorate its buildings, and the like. On the other hand, a corporation established by or under the provisions of an Act of Parliament must rigidly confine itself to the powers conferred upon it by that Act of Parliament, or its documents of incorporation granted thereunder. All acts not within these powers are *ultra vires* and void ; they are treated, not as the acts of the corporation, but merely as the acts of those directors or officials who in fact authorize or perform them. Thus, for example, if the directors and secretary of a commercial company formed to deal in



wool sign a contract for the building of a bridge, the persons with whom they contract can look to them only, and not to the company, for carrying out the contract, nor will the resources of the company be liable to make good any default in performance of the contract. The application of this doctrine to purely unlawful acts of a corporation's servants and officials has caused some little difficulty. Ought the corporation to be liable, not as having authorized such acts, but on the general principle that a master is liable for the unlawful acts of his servant done in the course of acting as such servant? In principle it ought; but the Court of Appeal, a generation ago, laid down the doctrine that if the act complained of could not lawfully have been done by the corporation itself, the corporation is not responsible for it when done by its servant. To which doctrine the natural reply is: Can an act admittedly unlawful ever be lawfully done? It is suggested that the principle of *ultra vires* has no application to such a case.

The peculiar nature of a corporation, as a group of individuals, necessarily raises the important question as to how it manifests its will. Obviously, it cannot be permitted to every member of a perhaps numerous group to bind the whole group by his words or writings. Accordingly, almost every corporation aggregate (the meaning of this phrase will be later explained) is organized by its charter or other document of incorporation in such a way, that some smaller group within it, or some individual, may speak and act in its name. Thus the Mayor and Council of a municipal borough, the directors of an ordinary joint-stock company, or the Master and Fellows of a college, have the general administration of the affairs of their respective corporations; and outsiders will, as a rule, be safe in dealing with them as its representatives. An important rule of English Law (to which there are, however, a good many exceptions) requires, as a condition of validity, the formal affixing of the common seal of a corporation aggregate to all conveyances and contracts entered into by it. But numerous acts of minor impor-



tance, especially if done in the necessary course of the daily business of the corporation, do not come within the rule; and a corporation which has had the benefit of goods supplied or services rendered to it under an unsealed contract, cannot refuse to pay for them, unless an Act of Parliament expressly requires such contracts to be made under its common seal. Moreover, ordinary joint-stock companies registered under the Companies (Consolidation) Act, 1908, are placed substantially on the footing of individuals in respect of contracts in this respect, except, of course, that a corporation, being an abstract entity, can only act through an agent.

Corporations are classified by text-books in various ways; but beyond the important distinction between 'common law' and statutory corporations, previously explained, the only classification which requires special notice is that which divides corporations into 'aggregate' and 'sole.' The corporation aggregate is the normal corporation, which, at any given time, normally contains a number of individuals as members. This number may be great or small, varying from the hundreds of thousands of burgesses of a large borough to the two members of a private joint-stock company. It is even said that a corporation aggregate would not necessarily cease to exist if all its members died, leaving no successors; and this is, probably, sound doctrine.

But English Law knows another kind of corporation, the 'corporation sole,' in which the group consists, not of a number of contemporary members, but of a succession of single members, of whom only one exists at any given time. This kind of corporation has been described by eminent legal writers as a 'freak'; but it is a freak which undoubtedly has a legal existence. It has been said that the Crown is the only common law lay corporation sole; though the Master of Trinity College, Cambridge, has been claimed as another example, and statutory examples, such as the Public Trustee and the Treasury Solicitor, are conspicuous. But the examples of ecclesiastical corporations sole are numerous. Every

diocesan bishop, every rector of a parish, is a corporation sole, and can acquire and hold land (and now also personal property) even during the vacancy of the see or living, for the benefit of his successors, and can bind his successors by his lawful conveyances and contracts. But, obviously, the distinction between the bishop or rector, in his personal and in his corporate character, is even harder to grasp than that between the members of a corporation aggregate and the corporation itself; and all the rules applying to the latter do not necessarily apply to the former—for instance, a corporation sole need not have a common seal. Again, though it is, in theory, possible for a rector, as parson (*persona*) of the parish, to sue himself as an individual, e.g. for dilapidations to the corporate property, yet it is believed that such cases are rare.

Finally, all corporations, in the absence of statutory exemption, are, it is said, subject to the Rule of Mortmain, which lays it down, that any alienation of land to a corporation in its corporate capacity, otherwise than under license from the Crown, though it may effectually transfer the land to the corporation, yet works a forfeiture to the Crown of the land in question. This rule, which dates from the thirteenth century, is said to have been due to the dislike of the King and other feudal landowners to see estates which should have produced military services, in the hands of churches and other unmilitary bodies; and the name ‘mortmain’ (*mortua manus*) is said to be derived from the ‘dead hand’ of the saint to whom the church land was habitually dedicated. Be this as it may, the rule was solemnly re-enacted so recently as the year 1888, and is still in force; though the statutory exemptions which have been grafted on it, have destroyed much of its importance. It is said (though the words of the section are by no means clear) that the Companies (Consolidation) Act, 1908, has abolished it so far as companies registered under that Act are concerned, except that companies not formed for purposes of gain must not hold more than two acres of land without the license of the Board of Trade.

## NON-CORPORATE GROUPS

Before quitting the treatment of what has been called 'group personality,' it seems advisable to say a few words as to the legal position of non-incorporated bodies or societies; the more especially as the subject has recently aroused some interest, and is of real importance.

It was said by a learned judge in a famous case decided just at the beginning of the present century, that a corporation and an individual or individuals are the only entities known to the Common Law who can sue or be sued, that is to say, have legal personality. In the view of that law, a mere society—a social or athletic club, a private school, a learned society not incorporated by charter or Act of Parliament, a Trade Union—is simply a collection of individuals. At the highest, these individuals could be indicted together for a conspiracy if their objects were unlawful. If goods were supplied to them by tradesmen, only the individuals who actually gave or authorized the orders could be sued for the price. If property was transferred to them, it vested in them as individuals; and each could claim his separate share. If a member broke the rules of the society, or the committee arbitrarily expelled a member, the society and the member had no remedy in a Court of Justice, unless proprietary rights were affected. If a club official stole the funds, he could not be prosecuted; because, in theory, the money belonged as much to him (if a member) as to any one else.

But, with the immense growth of non-corporate societies which sprung up in England after the repeal of the Combination Laws in 1824, it became necessary, especially in the interests of the poorer members of the community, to do something to mitigate the hardships which arose from this ignoring of patent facts. Accordingly, certain statutes from time to time afforded protection, through the Criminal Law, to the funds of such societies, and others afforded even further protection to the property of such of them as should think fit to register with a Government Department and submit to the inspection



of a Government official, the Registrar of Friendly Societies. But the public was somewhat startled, and the members of one very important class of these unincorporated societies profoundly dismayed, when it was pronounced by the highest judicial tribunal in the land, in the famous 'Taff Vale' case in 1901, that a registered Trade Union might be sued as such for the tortious acts of its servants and alleged agents, and its funds attached to make good the damage alleged to have been inflicted by them. With the usual caution of English tribunals, the House of Lords confined its pronouncement to the single case of Trade Unions registered under the Act of 1871; and, when the effect of the Taff Vale judgment was practically nullified by the Trade Disputes Act, 1906, the law was left in a thoroughly unsatisfactory condition, which still more recent legislation has even aggravated. Does the principle of the Taff Vale decision apply to all unincorporated societies? Or to all unincorporated societies which happen to be registered under some Act of Parliament, e.g. clubs which supply intoxicating liquor to their members? Does it cover contracts as well as torts? What degree of authority is required to render the funds of such a society responsible for the acts of persons alleged to be acting on its behalf? Unless and until some systematic attempt is made to answer these, and similar questions, the law on the subject can hardly be said to be in a satisfactory state.



PART III

*THE STATE AND JUSTICE*



## CHAPTER X

### THE CROWN AND ITS SUBJECTS

HISTORICALLY speaking, all exercise of political authority in England is derived from the strong and centralized monarchy set up by the Anglo-Norman kings in the eleventh century. Subject to the fluctuating and, on the whole, decaying power of the feudal nobles, the monarchs of the Anglo-Norman line, until the middle of the thirteenth century (i.e. for a period of about two hundred years) exercised an authority which has received the suggestive name of the Royal Prerogative, because it was incomparably superior to the authority of any other person or body in the land. At the end of the thirteenth century, there came into being a body, the Parliament, which was, by slow degrees, to challenge and, ultimately, rival the Royal Prerogative as a source of authority. But, before that time, the monarchy had so entrenched itself in the institutions and the imagination of the country, that even the successful revolutions which were subsequently directed against certain occupants of the throne never succeeded in displacing it from its foremost and indispensable place in the scheme of English government.

It would, however, be a mistake to suppose, that the Anglo-Norman monarchy of the two first centuries was 'absolute,' in the sense that the King could do whatever he pleased. It was far removed from the Oriental type of monarchy in which the lives and fortunes of its subjects are but as dust before the caprices of the ruler's will; still further removed from the artificial and exaggerated 'sovereignty' of the Austinian jurist. Time and again, after taking possession of his conquest, William of Normandy had promised to his English subjects the "laws that they were worthy of in King Edward's (the Con-

fessor's) day " ; and, though no complete record of those laws appears ever to have been drawn up, yet there can be no doubt that the great mass of Englishmen believed, and held tenaciously to the belief, that their ancient customs, many of which were solemnly inscribed in Domesday Book and others expressly guaranteed by the various charters of William's immediate successors, (all being implicitly adopted by the coronation oath of each succeeding King), set up a somewhat vague but impenetrable barrier beyond which the King's authority could not go. Naturally, this barrier was immensely strengthened by the legislative activity assumed by Parliament in the succeeding centuries ; but, within the limits prescribed by law, customary and statutory, the King's authority was unfettered, and his Ministers set up one institution after another—Exchequer, Law Courts, Privy Council—which spread its influence throughout the lives of the King's subjects. Thus, despite the technical demands of Austinian jurisprudence, we should be justified in speaking of the mediæval English monarchy as 'sovereignty subject to law.' It was in vain that Sir Robert Berkeley, of the King's Bench, in the famous Ship-Money case of 1638, said : " I never read nor heard that *Lex* was *Rex* ; but it is common and most true, that *Rex* is *Lex*." The judgment of that Court, and especially the words of Sir Robert Berkeley, were emphatically repudiated by the Long Parliament ; and the firm conviction, so deeply engrained in the national consciousness, that even the King is bound by the law which he has sworn to enforce, is probably the historical foundation of that famous Rule of Law, which, as we shall see in the following chapter, is one of the chief safeguards of English constitutional freedom.

It appears not to have been until the second half of the sixteenth century, in the stirring and thought-provoking days of the great Elizabeth, that the conception of England as a proprietary domain of the King, and of the people of England as his subjects, or subdued people, began to give way before the wider conception of what we



now call a 'State,' i.e. a political society or nation, or, perhaps better still, an organization for purposes of government (*status reipublicae*). The now familiar word 'State' does not seem to have been used in this sense before the reign of Elizabeth; but it then became extremely popular with writers and politicians, and undoubtedly indicated a broadening conception of politics, as the concern of the whole community, not merely of the King and his Ministers. One of its most conspicuous appearances was in the title of the Council of State of the Cromwellian Protectorate; and it may be due partly to that fact that the word 'State,' as well as its contemporary 'Commonwealth,' for a time lost favour. At any rate, the tendency to make use of it in political and legal matters declined; and it was replaced in the writings of constitutional lawyers by the word 'Crown,' which, obviously, is an attempt to combine the personal character of the monarchy as symbolized and represented by the King, with its corporate character as a political institution, which goes on independently of the personal fortunes of the monarch. This use of the word conformed admirably with the constitutional tendencies of the eighteenth century in England, the chief result of which was to substitute, in matters political, for the personal wishes of the King, the advice of Responsible Ministers, while at the same time preserving the traditional forms of the mediæval monarchy, with their profound appeal to the popular imagination. As we shall see in the following chapter, this practice has had its inconveniences from a legal point of view. Nevertheless, the use of the word 'Crown' to signify the constitutional relationship between rulers and ruled has now become too firmly fixed in legal language to be questioned. We have therefore to consider who are the Crown's subjects, and then what are their duties and rights as such.

The law of British nationality depends now mainly upon the British Nationality and Status of Aliens Act, 1914, as amended in the years 1918 and 1922. By those Acts British subjects fall into two classes of natural-born and

naturalized persons. We may deal first with natural-born subjects of the Crown.

All persons born within the King's dominions and allegiance, all persons born outside the King's dominions whose fathers were British subjects (natural-born or naturalized) or were in the service of the Crown at the time of their respective births, and all persons born on British ships (even when in foreign territorial waters), are deemed to be natural-born British subjects. The general principle of territorial nationality has long been established; being due, probably, to feudal principles, which superseded the older ties of blood upon which tribal society was based. No definition of the word 'allegiance,' so curiously introduced into the qualification of a natural-born subject, is given in the Act; but it appears to point to a class of persons who are born of British parents in places where, "by treaty, capitulation, grant, usage, sufferance or other lawful means, His Majesty exercises jurisdiction over British subjects under the provisions of the Foreign Jurisdiction Acts."

A woman married to a British husband acquires British nationality; and if, during the continuance of his marriage, her husband ceases to be British, his wife (whether British-born or merely British by marriage) may claim to retain British nationality.

In addition to the acquisition of British nationality by a woman on her marriage, an alien may become a British subject by the grant of a certificate of naturalization by a Secretary of State. But such a certificate cannot be granted to any applicant who cannot satisfy the authorities that—

(i) he has either resided within the King's Dominions for five years, of which the year immediately preceding his application must have been spent in the United Kingdom, and the rest have fallen within eight years prior to his application, *or*, that he has served the Crown for five years out of the last eight;

(ii) that he is of good character and has an adequate knowledge of English;

(iii) that he intends either to reside within the King's Dominions or to enter or continue in the service of the Crown.

Moreover, even if these conditions are fulfilled, the grant of the certificate is in the absolute discretion of the Secretary of State, it does not operate until the applicant has taken the oath of allegiance, and, as we shall see, it may be revoked for good cause. There are, however, discretionary relaxations as regards periods of residence for the widows or divorced wives of aliens, who were British subjects before their marriages to aliens.

Until comparatively recently, voluntary resignation of nationality was not generally recognized, except, perhaps, by the marriage of women nationals to aliens. The maxim was: *nemo potest exuere patriam*. So far as England is concerned, however, recent legislation freely recognizes the right of any British subject resident in a foreign country to become naturalized in that country, (presumably only in time of peace) and, thereupon, to lose his British nationality. A former alien woman, who has become British by marriage with a British subject, does not lose her new nationality merely by her husband's death. But a person who, by reason of his birth on board a British ship, became a British subject, but by the law of any foreign State is a subject of that State, may, on attaining his majority, make a declaration of alienage; as may also any person who, though born outside the King's dominions, became at birth a British subject under the general rules above stated. Where a British subject becomes an alien under the above provisions, his children under age also cease to be British subjects, unless they do not, by the law of any other country (i.e. usually their parents' new country) become naturalized in that country. Apparently this rule applies to the minor children of married women who cease to be British subjects. But, when a British widow marries an alien, her children by her former husband do not cease to be British subjects.

Finally, a certificate of naturalization will be revoked



if it is proved, to the satisfaction of the Secretary of State, that it was obtained by false representation or fraud, or by concealment of material circumstances, or that the grantee has shown himself disaffected or disloyal to the King, or traded or communicated with the King's enemies in time of war, or (within five years after the grant of the certificate) been sentenced by any British Court to penal servitude, imprisonment for a year or more, or a fine of not less than £100, or that he was not really of good character when the certificate was granted, or that (with certain exceptions) he has been resident outside the King's dominions for seven years since the grant of the certificate, or that he remains a subject of an enemy State by the law of that State. But, before proceeding to such revocation, the Secretary of State may order an enquiry into the facts; and, in certain of the cases of revocation above described, the holder of the certificate is entitled to notice of the Secretary of State's intention, so that he may demand such an enquiry.

When a certificate of naturalization is revoked, the wife and minor children of the naturalized person do not cease to be British subjects, unless so directed by the Secretary of State; and the Secretary of State cannot so direct where the wife was a natural-born British subject before her marriage, unless she has herself been guilty of one of the offences for which a certificate could be revoked. But the wife of any person whose naturalization has been revoked, may within six months make a declaration of alienage; and thereupon she, and their minor children, become aliens.



## CHAPTER XI

### DUTIES OF THE SUBJECT

IN a broad sense, it may be said to be the duty of the subject to obey the whole of the law of his country, the enforcement of which is, almost exclusively, in the hands of the Crown. But when the Crown enforces that part of the law which we call the Civil Law, i.e. the law which regulates the rights and duties of members of the community *inter se*, it does so, as we have seen, purely as a judge or arbitrator, not as a party directly interested. Consequently, when A breaks a contract which he has made with B, and B sues him for damages, A is regarded as having failed in a duty to B, rather than to the Crown. Even in the domain of the ordinary Criminal Law, though there, as we have seen, the Crown acts in the double rôle of prosecutor and judge, yet in the former capacity it is, except in certain special cases, acting rather as the mouthpiece of the community, or even of the party specially injured by the crime, than as an offended ruler, punishing an attack upon his authority.

Leaving, therefore, the duties imposed by the ordinary Criminal and the Civil Law for future consideration, we deal in this chapter only with the special duties of the subject towards the Crown as the ruler or Head of the State. The branch of the law which creates these duties is generally known as Constitutional Law. That law also comprises the important subject of the relations of the different parts of that complex mechanism which we will call the State, with one another. But that part of Constitutional Law, to which we shall only incidentally refer, is too vast a subject to be introduced into a book like the present. Moreover, it rarely comes up for treat-

ment by the Courts of Law ; and, indeed, some of it, though very important, is not strictly law at all.

1. *Allegiance*.—In spite of all the changes which have taken place since the establishment of the Anglo-Norman rule in England, the English monarchy remains, in theory at least, strongly military in character. The oath of allegiance, the symbol of the loyalty to his military commander of the Roman soldier, passed into the feudal age, in which it was carefully distinguished, at any rate in England, from the oath of fealty, or faith to the vassal's immediate lord. In theory, it could be imposed upon all subjects at all times ; and, during periods of political and religious bitterness, it was often imposed in the most searching and vindictive manner. Consequently, in the general relaxation of political and religious tests which took place in the nineteenth century, the tendency to disregard such tests grew, until, by the Promissory Oaths Act of 1868, it was definitely enacted, that the oath of allegiance should only be demanded from certain high officials on their assumption of office, from clergymen of the Church of England on their being ordained, from members of Parliament, on taking their seats, from members of the military services of the Crown, from persons on whom peerages and dignities are conferred, and later, as we have seen, from aliens on becoming naturalized British subjects. Nevertheless, the duty of allegiance is on every subject of the Crown, whether he has taken the oath or not.

Generally speaking, a violation of allegiance constitutes the offence of High Treason, the most serious crime recognized by the law. But the difficulty of defining what in fact constitutes such a violation, led, many centuries ago, to a statutory definition of treason ; and it is a curious and not altogether convenient fact, that the present Law of Treason dates substantially from the days of the personal monarchy of the fourteenth century, and is not a little inadequate to the very different conditions of the modern State. It is true that the Tudor monarchy made very considerable attempts to recast the mediæval Law

of Treason ; but these attempts were unpopular by reason of their severity, and were mostly abolished on the death of Henry VIII, though one or two of the newer treasons were revived under Elizabeth and later monarchs.

At the present day, only five forms of treason are recognized by English Law ; and, as will be seen at a glance, all of them except one are concerned immediately with the personal safety and dignity of the King. They are :

(i) Compassing or imagining the death of the King, Queen, or Prince of Wales.

(ii) Levying war against the King or adhering to his enemies in his realm, giving his enemies aid or comfort, in the realm or elsewhere.

(iii) Violating the chastity of the Queen, the wife of the Prince of Wales, or the King's eldest daughter, being unmarried.

(iv) Slaying the Chancellor, the Treasurer, or the Justices of the Bench, of Assize, of Oyer and Terminer, being in their places, doing their offices.

[These four offences are specified by the Statute of Treasons of 1351.]

(v) Questioning the title to the throne of Great Britain under the Act of Settlement of 1700.

[This obscure provision has had no serious value since the disappearance of Jacobite pretensions.]

But, although what may be called direct attacks upon the foundation of the State are dealt with by this extremely restricted code, there remains a list of minor offences, known as 'treason felonies,' consisting mainly of acts evincing an intention of committing treason without actually entering upon its fulfilment, and 'treasonable misdemeanours,' which are acts (such as pointing firearms, or discharging explosive materials) calculated to endanger or alarm the King or disturb the public peace. Tampering with the loyalty of troops, endeavouring to stir up mutiny in the Royal forces, causing disaffection among the police, unlawful arming or drilling, attacks on Royal dockyards and arsenals, are, also, obvious threats



against the stability of the Crown as, in a special sense, the military authority of the State; and, even though they may not contemplate any actual danger to the person of the King, and therefore, on that account, are not, technically, treasonable, they may fairly be regarded as breaches of the tie of allegiance, which binds every British subject, whether or not he has actually taken the oath. They are punishable with various penalties, varying from capital punishment for High Treason, down to two years' hard labour for attempting to cause disaffection in the police forces.

It might naturally have been expected, that the essentially military allegiance which binds the subject to the Crown, would have enabled the Crown to enrol, voluntarily at least if not compulsorily, the subject for military service. There is strong reason for believing that some such liability on the part of the subject originally formed part of the structure of the kingdom; and it still survives, technically, in the right of impressment for the Royal Navy, though, for the best part of a century, the Royal Navy has been manned by volunteers.

But one of the great results of the introduction of feudal principles into mediæval Europe, was to make the professional soldier a class apart, and to limit the military liability of the ordinary subject to defence or militia purposes. Hence it was that, during the critical years of the Anglo-Norman monarchy, the rule was established, that foreign wars should be conducted by the feudal array, from which the ordinary peasant-farmer, then forming the bulk of the population, was excluded, while the peasant, including, ultimately, the serf, was liable to serve in the defensive militia. With the decay of feudalism at the end of the thirteenth century, its place was taken by a new type of professional soldiery, raised on 'commissions' (or contracts) 'of array'; and to these, who served openly for pay, the name of 'soldier' (*solidarius* or 'shilling-man') was first given. They were exceedingly unpopular; and statute after statute was passed, especially in the fourteenth century, to remedy the abuses of the system,



which included, not merely compulsory requisitions of men, horses, and armour, but the intolerable hardships of the billeting of troops on civilians, and the 'purveyance' or purchase at an under-value, of provisions, carts, and other necessities of a professional army. Curiously enough, the victory of the Parliamentarians in the Civil War led in fact to the permanent establishment of a professional army in the country—the oldest of the existing regiments of the British army date precisely from that period. But the dangers of the system were clearly seen in the days of James II; and one of the first cares of the Revolution Parliament of 1688, which drew up the famous Bill of Rights, was to insert a declaration (historically untrue but practically wise) that "the raising or keeping a standing army within the kingdom in time of peace, unless it be with the consent of Parliament, is against the law." This clause it is which gives to Parliament the control of the army, and renders it unlawful for the Crown, at any rate in time of peace, not only to levy troops for professional service in the realm by compulsion, but even to accept voluntary offers of service in that capacity.

2. *Maintenance of order.*—It is one of the oldest, as well as one of the most wholesome traditions of England, that to assist in the maintenance of order is a duty incumbent on every one who is not exempted by physical infirmity or other lawful excuse. We may mention the universal liability on males of fighting age to serve in the militia or defence force, so carefully kept on foot by the Anglo-Norman kings; the duty of the peace-borhs or tithings to raise the 'hue and cry' in pursuit of malefactors, and the special duty of the three neighbouring townships to make a presentment of 'Englishry' if a man was found slain on the highway; and the special power of arrest conferred, as we shall later see, upon a private citizen in whose presence a felony is committed or a breach of the peace threatened. Coming to statutory duties, we find so recent an Act of Parliament as the Sheriffs Act of 1887 laying it down, that "every person in a county shall be ready and apparelled at the command of the sheriff and

the cry of the county to arrest a felon . . . and in default shall on conviction be liable to a fine"—a policy which goes back to the great Statute of Westminster the First of 1275. But that the liability to assist in the maintenance of order is not confined to the arrest of felons, is shown by the prosecution of the Mayors of London and Bristol in 1832, in connection with the Reform Bill riots ; for, though the Mayor of Bristol was acquitted for want of evidence, the Lord Mayor of London was found guilty of neglect to take proper proceedings to restore order, though defended by the great advocate, Erskine. If it be urged that these two persons were magistrates, and so under a special duty to maintain order, the statements of the learned judges who directed the juries in these cases make it clear that, while the responsibility of a magistrate may be greater, his duty varies only in degree, not in essence, from that of the ordinary citizen ; and indeed, only nine years later, a Bedfordshire inn-keeper and three other persons were fined and ordered to find securities for good behaviour because they refused to assist a constable who was trying to stop a prize-fight.

It would be interesting to know whether the recent changes in the law on the subject of women have now rendered women liable to the performance of this possibly dangerous duty of assisting to maintain order.

3. *Service in unpaid office.*—During the Middle Ages, the Crown got most of its civilian work done, not by paying its servants out of its own revenues, but by allowing them to exact fees for the performance of their duties. Such offices were, naturally, far from popular, except with a somewhat grasping and brutal type of person ; and they were looked on as burdens rather than honours. The Crown replied by establishing the rule of compulsion ; and such offices as sheriff, coroner, reeve, mayor, juror, constable, and watchman, with the later overseers of the poor, and witnesses in legal proceedings, have retained these characteristics. In some of the more burdensome, e.g. that of the sheriffs, the absence of a formal legal qualification is sometimes pleaded as an excuse for exemption.

For, in the days when much of the local government of the country was carried on by the sheriffs, the qualifications of these officials were of great importance ; and, ever since the year 1311, it has been statute law that a sheriff must have lands and tenements (in the county) whereof he can answer to the King and to the people for his deeds.

4. *Payment of taxes.*—The burning questions of the right to levy and expend money for the service of the State have always been among the livelier incidents of political history ; and English history has been no exception. It is impossible here to tell the story how the subject has gradually acquired the right that no tax shall be demanded of him except such as have been voted in detail by Parliament and embodied in a Parliamentary statute. The doctrine has been stated over and over again in successive constitutional documents like the Petition of Right of 1628, the Ship-Money Act of 1640, and the Bill of Rights of 1689 ; but in spite of this, it has been necessary to appeal to it on more than one recent occasion, notably in 1912, when Mr. Bowles successfully sued the Bank of England to recover income-tax which had been voted by the House of Commons in Committee of the Whole House but not yet formally embodied in the Finance Act of the year. Again in the years immediately following the Great War, when Government Departments, invested with various powers to grant licences,—e.g. to move milk or sell ships—endeavoured to recoup the State some of its improvident bargains made during the war, by charging large sums for the issue of such licenses, the question arose. Such steps were declared to be levying of money for the use of the Crown without grant of Parliament ; and the officials concerned were only saved from serious consequences by a timely Act of Indemnity.

Subject to these powerful constitutional safeguards, the taxpayer is pretty much at the mercy of the Crown, or, rather, of the officials of the Inland Revenue and other financial Departments. It is true that certain eminent Judges have uttered *dicta* as to the right of the subject to arrange his affairs in such a way as to attract as little



taxation as possible ; and it is clear law that the *onus* of proving that, in any case, the tax falls on the subject, is upon the Crown which claims it. But as each new device for escaping taxation manifests its efficiency, it is declared ineffective by a Finance Act ; and, in the steps taken to recover unpaid taxes, the prerogative privileges of the Crown, many of them unknown even to the ordinary lawyer, are used ruthlessly. This is, doubtless, right ; for the less one taxpayer pays, the more another has to pay. What is not quite so justifiable, is the special protection which, contrary (as we shall see) to general principles, is being cast over the revenue official, as distinct from the ordinary Government official. Thus, for example, by s. 229 of the Income Tax Act of 1918, when an Inland Revenue official is sued or prosecuted for unlawful seizure or detention of goods, if he can induce the Court to certify that there was 'probable cause' for the seizure, the plaintiff gets neither damage nor costs beyond the value of the goods seized, even in the event of his being declared in the right ; and the official is not liable to any punishment.

We now turn from the positive to the negative duties of the subject.

5. *Observance of order.*—It follows, almost inevitably, from the duty of the subject to assist in the maintenance of order, that he is himself bound to do nothing to disturb that order. A breach of the King's Peace was at one time the most comprehensive of all offences against the Crown ; it indeed included, and still includes, all the more serious crimes. At one time, in fact, every indictment charged the accused with an offence "against the peace of our Sovereign Lord the King" ; and, though this form is no longer employed, that is mainly because the imperative duty of not disturbing the King's Peace has by now evolved into an elaborate system of Criminal Law. We confine our attention here to those acts which more directly disturb public order, and from which, therefore, the subject is bound to abstain. Let us take a few examples.

(i) *Self-help.*—Ever since the Crown assumed the general



administration of justice in the land, it has, naturally, been jealous of any attempt by the subject to take the law into his own hands. One of the most widely prevalent of such attempts was the act of Distress, or seizure of a debtor's goods or lands to compel him to appear before a tribunal. This practice, though an important link between pure barbarism and ordered society, was gradually but firmly restricted by the royal action of *Replevin*, till it was reduced to its existing very slender proportions, so far as the subject is concerned, being now confined to claims for rent and animals doing damage, and those only under severe modifications. A series of important Acts of Parliament, known as the Statutes of Forcible Entry, passed in the fifteenth and sixteenth centuries, absolutely prohibited any resort to self-help on the part of a claimant of land, and ordered magistrates promptly to eject a person who so acquired possession, however good his title.

Nevertheless, the ancient right of self-help exists, even under modern English Law, to an extent which is not always understood. Not only may a subject resort to any violence which is really necessary to prevent attack upon himself, his wife or children, his servants, his land or goods, or to prevent the commission of a felony; but he may, in certain cases, 'abate'—i.e. forcibly remove, an object which is unlawfully causing harm or 'nuisance' to his fixed property, such as the branches of his neighbour's trees which overhang his boundary, and he may even forcibly seize and recover chattels which have been improperly taken out of his possession. But the Courts are apt to regard such proceedings with disfavour, the more especially as they have elaborated an alternative method by which the party injured can apply to them for an 'injunction' against the original wrong-doer, to compel him to make good the damage done and cease the unlawful acts. Moreover, it is noteworthy, that the claim to seize chattels is confined to chattels corporeal, i.e. tangible objects of the value of which their physical qualities are the source. It does not apply to incorporeal chattels, such as debts, patents, and the like, which are known as

'things in action,' i.e. enforceable only by legal proceedings.

(ii) *Riot*.—This was at one time, especially in the sixteenth and seventeenth centuries, when population was growing more rapidly than the means of controlling it, a very common offence, which caused great anxiety to the authorities. A riot is defined as an unlawful assembly (i.e. an assembly come together in pursuance of an unlawful purpose), consisting of at least three persons, which has begun to create a breach of the peace. At Common Law it is an indictable misdemeanour, punishable by fine and imprisonment, to which a statute of 1823 adds hard labour. But the statutory form of it, introduced by the Riot Act of 1714, is better known. By that statute, passed to deal with Jacobite disturbances, it was provided that the members of a riotous assembly of twelve or more persons which does not disperse within an hour after the reading by a magistrate of the proclamation contained in the Act, become guilty of felony, which, at the time of the passing of the Act, was a capital offence, and is, even now, punishable with penal servitude for life. It is a popular mistake to suppose, that the so-called 'reading of the Riot Act' is an essential preliminary to the dispersal by force of a riotous assembly. The only effect of it is to turn what was formerly only a misdemeanour into a felony, much more heavily punishable. It was his sensible recognition of this truth which enabled George III to put down the 'Gordon Riots' of 1780, which had kept London for days in a state of terror-stricken panic.

(iii) *Sedition*.—This, perhaps the very vaguest of all offences known to the Criminal Law, is defined as the speaking or writing of words calculated to excite disaffection against the Constitution as by law established, to procure the alteration of it by other than lawful means, or to incite any person to commit a crime to the disturbance of the peace, or to raise discontent or disaffection, or to promote ill-feeling between different classes of the community. In spite of the fact that one of the most recent cases of sedition was concerned with an attack

on the personal character of the King, a charge of sedition is, historically, one of the chief means by which Governments, especially at the end of the eighteenth and the beginning of the nineteenth century, strove to put down hostile critics. It is evident that the vagueness of the charge is a danger to the liberty of the subject, especially if the Courts of Justice can be induced to take a view favourable to the Government. Happily, in the days when this danger was greatest, the sturdy independence of juries was a real safeguard against oppression, and a strong justification of the jury system.

If the seditious intention manifested in the words or writings of the accused has developed so far as to cause the party uttering them to enter into an agreement with any other person to carry them into effect, these persons are guilty of a seditious conspiracy, which will, probably, be treated more seriously than mere seditious words or writings. There is no specific penalty, either for sedition or seditious conspiracy, which are common law offences punishable by fine or imprisonment, or both. But it is remarkable, that persons convicted on either of these charges are, apparently, entitled to be treated with peculiar favour in prison.

(iv) *Betrayal of State secrets.*—This is a comparatively modern offence, largely connected with the rise of sensational journalism, which is willing to pay high prices for interesting information ; but its history goes back at least to the Wars of Religion, when the assumed necessity of a knowledge of the plans of other Governments made spying an accepted branch of diplomacy. For a long time, spies were outside the law, and, if they were caught by their intended victims, were given short shrift without trial. But a notorious case which happened towards the end of the nineteenth century induced Parliament to put the betrayal of Government secrets, especially when committed by its own employees, on a statutory footing. The matter is now dealt with by statutes of 1911 and 1920, known as the Official Secrets Acts. It is far too complicated to be explained in this book ; but the numerous



offences created by the Acts include such different matters as the disclosure of confidential papers, stealing or attempting to procure such documents, trespass on 'prohibited places' such as dockyards, camps, arsenals, stores, offices, warehouses, and other buildings used for Government purposes, and communication with foreign Governments. The amending Act of 1920 is concerned mainly with creating an elaborate machinery for dealing with any possible revival of the war activities of foreign and other spies.

(v) *Obstruction of justice.*—To interfere with the administration of justice is to endanger the reputation of the Crown as its dispenser, and is sternly repressed. It may take the form of an attempt to corrupt officials or juries, known technically, as 'embracery,' or the hardly less dangerous practices of 'maintenance,' i.e. the upholding or fomenting of cases in which the maintainer has no legitimate interest, and still worse, 'champerty,' or the purchase of law-suits with a view to a profit. Tampering with, or the intimidation of, witnesses, is another offence of this kind. All are misdemeanours, punishable on conviction by fine and imprisonment at the discretion of the Court. Of perjury we have spoken before. Obviously it tends, in the most serious manner, to obstruct the flow of justice; and though, for historical reasons, only a misdemeanour, it is punishable with the heavy sentence of seven years' penal servitude, or imprisonment with hard labour for two years and a fine, or with both. 'Contempt of Court' is a direct and open attempt to obstruct the fair trial of a case, either by insulting behaviour to the judge, or by the publication of newspaper articles or pictures tending to prejudice the jury, or to bring the proceedings into ridicule or contempt. It is punishable in a summary manner by the Court obstructed, with fine or imprisonment, or both.

6. *Abstention from international quarrels.*—Theoretically, it is clear that the enthusiastic joining in international quarrels by the subjects of neutral or friendly Governments, is apt to make much trouble for their own countries. A notorious instance was the ill-advised sympathy and



assistance extended by British subjects to the Southern cause during the American Civil War of the seventh decade of the last century. After its close, the victorious North not unnaturally put in an enormous claim for damages for the losses inflicted through the action of professed neutrals; and the British taxpayer had to pay heavily for the indiscretion of his fellow countrymen. Thereupon Parliament passed the Foreign Enlistment Act, 1870, which, repealing an old statute of 1819, made it a penal offence for a British subject, wherever living, to enlist in the service of any State at war with a State with which the Crown is at peace, to induce or assist others so to do, to build, commission, equip, arm, or despatch any vessel, knowing, or having reason to believe, that she will be employed in the service of any such State, or to fit out any naval or military expedition against any friendly State, without the license of the Crown either by sign-manual or Order in Council. Ample powers of interference with any such acts are conferred upon both military and civil officials; and, generally speaking, conviction of any offence against the Act includes not only fine and imprisonment to an unspecified extent, but a forfeiture of any material prepared or acquired for the purposes of its commission.

## CHAPTER XII

### RIGHTS OF THE SUBJECT

It is of the essence of free government that its subjects should have rights, that is to say, means of securing the exercise of their freedom. It is true that, according to the narrow doctrine of the Austinian jurists, no subject can have rights against the State, or even against the Crown; because from the former are derived all the laws by which rights are created, whilst against neither Crown nor State can a subject lawfully exercise compulsory jurisdiction. Historically speaking, it is, as we have seen, impossible to accept the Austinian view that all laws are the creation of the State; while the ingenuity with which English Law gets over the second difficulty, the existence of which may be admitted, is of itself sufficient to expose the unpractical character of the doctrine of the Austinian school.

1. *Government according to law.*—It is the basis of the Englishman's rights as a subject, that, whatever duties may be imposed upon him by the State, they shall be enforced only in a legal manner and on legal authority. This is the real meaning of that RULE OF LAW, which, in the opinion of the most competent critics, is at once the most original and the most valuable guarantee of the Englishman's constitutional rights. It is worth while taking a little pains to understand exactly what it means.

The antithesis of the Rule of Law is the Rule of Autocracy. The conflict between the two ideals was the great point at issue in the Ship-Money Case of 1637. Stripped of all its verbiage, the argument of the Crown lawyers was in essence this: "We admit that for centuries there has been a doctrine that taxes can only be levied by Act of Parliament, and that the doctrine is explicitly con-

firmed in more than one great constitutional charter; the last having been granted by the present King only ten years ago. But we say there is a crisis by which the safety of the country is threatened. We cannot explain to you exactly how; but you must take the King's word for it. The levy of this tax is an act of State and cannot be questioned. *Rex is Lex.*" Hampden's advocates, on the other hand, in effect, said: "The Law of England knows nothing of acts of State. If the law is that no tax can be levied save under an Act of Parliament (and that is admitted) we say that this claim cannot be enforced. *Lex is Rex.*" Upon that issue the Civil War was fought; and, when the disturbances and reactions were over, and things settled down again under the Constitution of 1689, it was realized that Hampden's view was right. Let us see how the principle for which Hampden fought and died has been worked out in practice.

First, "the King can do no wrong." That sounds an unpromising start for a theory of political liberty; but the English are a prudent and self-respecting nation, and feel that it would not only be indecent in the highest degree, but dangerous to the tranquillity of the State, that there should be anything in the nature of compulsory process against the King himself. For one thing, a criminal prosecution of the King would be an absurdity; for all criminal process is (as we have seen) in the name of the Crown, and, though the English are not a particularly logical people, the idea of the King prosecuting himself and condemning himself, say, to penal servitude, does not appeal to them. They can do better than that. Even to bring a civil action for a 'tort,' such as Trespass or Libel, against the King personally, would be scandalous. Only when the demand of the subject is for the restoration of property which has irregularly got into the hands of the Crown, or for the fulfilment of a contract which has been entered into by the Crown's servants on its behalf, can the suitor, by the respectful method of a petition of right, presented under the provisions of an Act of Parliament of the year 1860, obtain direct redress against the

Crown. The petition is left with the Secretary of State, who, unless it is purely frivolous, endorses it "*Fiat* (justitia)." It is then treated by the officials of the Law Courts as the basis of an ordinary civil action, which goes through the stages of a private lawsuit; the Treasury Solicitor appearing and defending for the Crown. If the Court is of opinion that the suppliant has made out his case, it delivers a declaratory judgment, which is lodged at the Treasury, and duly carried out by the proper officials, either by payment of money out of public funds, or by an *amoveas manus* of the property.

But what about crimes and torts?

"The King can do no wrong." Therefore, the King cannot give an unlawful order. Therefore, if a presumptuous person, prosecuted or sued for a criminal or tortious act done against a subject, should dare to say: "I did this by order of the King," the Court would simply reply: "We don't believe it. The King is incapable of giving such an order." This is, doubtless, a fiction; but it is a perfectly logical fiction, which excludes the plea of 'act of State,' and justifies, though in a respectful and loyal way, the arguments of Hampden's counsel in 1637. The critical date of the change in the law is said to be the impeachment of the Earl of Danby, in the later years of the reign of Charles II. The Earl had, in fact, a written authority from the King to do the act for which he was impeached. It did not save him. Nearly a century later, in the famous series of cases connected with the stormy career of John Wilkes, the old plea of 'act of State' was heard again. But it was brushed aside with contempt by the Chief Justice.

Thus the great rule emerged. A subject injured by a Crown official can prosecute him criminally and sue him in tort for unlawful acts done in the prosecution of his duty; and the official cannot shield himself behind his official authority. He is not, in fact, sued as an official, but as a private person, who, by breaking the law, has ceased to be a representative of the Crown.

This last point is important; and important conse-



quences follow from it. One is, that only the individuals who actually did, or authorized, the wrongful act, can be prosecuted or sued for it. Particularly, the doctrine of *respondeat superior* does not apply ; for the official subordinates of a Crown official are not his servants, and he is not responsible for their misdeeds unless he actually authorized them. Consequently, though an omnibus company can be sued for the negligence of its drivers, even though its directors took every care to forbid negligence, the head of a government department cannot be sued for the negligence of his subordinates, unless he actually authorized it. Thus, though the subject can get the subordinate criminally punished if his act was criminal (e.g. assault), or ordered to pay damages if it was only a tort, yet he may not be able to recover the damages which the defendant is ordered to pay, because the defendant cannot pay them. This is, obviously, a weak spot in the Rule of Law ; and there have recently been attempts to mend it. For example, Government Departments have been set up “with power to sue and be sued” ; and such departments have even, in one or two cases, been incorporated. Yet, in spite of this, the Courts have steadily refused to allow them to be sued, in their official capacity, for the torts of their subordinates ; unless the statute which incorporates them expressly says they may be. At the highest, it has been suggested that the official corporation might be sued as a corporation, not as the representative of the Crown ; but as it has no property, except what it holds in trust for the Crown, that is not a very practical help. To all arguments of hardship on the subject, the Courts return the stony answer : “By no means can you make the public revenues liable for the defaults of a Crown official.”

It does not seem to be a very conclusive answer. Doubtless, it is hard that the public should have to pay for the stupidity or malice of a Government official. But it is much harder that the whole loss should fall on the individual plaintiff. If a poor man is knocked down and

killed by the gross negligence of the driver of a Post Office motor van, is it right that his widow and family should starve because the driver cannot pay damages? Surely, the sooner this barbarous doctrine is altered the better. The public ought to take responsibility for its servants.

### THE HABEAS CORPUS

It is, of course, exactly as a buttress of the Rule of Law, that the famous remedy of Habeas Corpus is so valuable. The writ of Habeas Corpus has had a most curious history. Apparently invented, so far back as the twelfth century, for the special purpose of putting accused persons into prison, it gradually became, during the next four centuries, by the action of the Courts of Justice, converted into a means of rescuing persons from unlawful custody, especially from the custody of arbitrary Crown officials. The story cannot be told here. Suffice it to say that, by successive Acts of Parliament in 1640, 1679, and 1816, the remedy of Habeas Corpus was gradually perfected, and made to extend to unlawful imprisonment by creditors and other private persons; until now it is a general remedy against unlawful imprisonment, more valuable than the right of action for damages, because it is more speedy and effective.

A person who alleges that he is wrongfully imprisoned, or any friend on his behalf, applies to a Judge of the High Court for a 'rule *nisi*,' directed to the person having the custody of the applicant, bidding him (the custodian) 'have the body' of the applicant before the Court immediately, "together with the day and cause of his taking and detainer, to undergo and receive all and singular such matters and things as Our Court shall then and there consider of concerning him in that behalf." The application must be supported by evidence raising a *prima facie* case; but the affidavit of the applicant himself is sufficient, unless it is manifestly inadequate. On receipt of a copy of the writ, accompanied by a notice

fixing the day for his appearance in Court, the custodian must produce his prisoner accordingly, accompanied by an explanation, or 'return,' of the cause of his detention. Of course if the prisoner is held by a regular gaoler under a legal warrant, he (the prisoner) is remanded to custody, unless the Court chooses (as it may) to enlarge him on bail. But if he is unlawfully imprisoned, the Court makes the rule 'absolute'; and the prisoner is forthwith set free. Even if he is remanded to custody on a regular criminal charge, he has the valuable privilege of being entitled to be put on his trial within a limited time, or set free. The Act of 1679 imposes the severest penalties on all persons (including judges) who fail to do their duty in the process; and many loopholes by which the sweeping provision of the Act of 1640 was evaded, are stopped up by the later Act.

The remedy of Habeas Corpus is so vital to the protection of the right of the subject to government according to law, that it is worth while to set out shortly the facts of a well-known case in which it was recently invoked.

In March, 1923, the Home Secretary, purporting to act under a Regulation made in pursuance of the Defence of the Realm Act and other statutes, ordered the arrest of one, O'Brien, in London, and his deportation to Dublin, to be interned by the Government of the newly-established Irish Free State, against which he (O'Brien) was alleged to be plotting. In the following month, O'Brien applied, first to a Divisional Court of three judges, and, on their refusal, to the Court of Appeal, for a rule *nisi* for the issue of a writ of Habeas Corpus against the Home Secretary in the usual form. In May, on the hearing of the return, the Court of Appeal made the rule absolute, but, in view of the fact that the applicant was not actually in the custody of the Home Secretary, allowed the latter a week in which to obey the writ. The Home Secretary took advantage of the delay to appeal to the House of Lords against the order absolute of the Court of Appeal; but the House of Lords, by an overwhelming majority, refused to entertain the appeal. O'Brien was thereupon set at



liberty ; and, but for a hastily passed Act of Indemnity under which pecuniary compensation was provided for him, he could undoubtedly have prosecuted criminally, and sued civilly, the Home Secretary for illegal imprisonment. The case is a vivid illustration of the working of the remedy of the Habeas Corpus. There emerge from it the three following important rules—(i) that the mere fact that the person against whom the writ is applied for has ceased to hold the applicant is no bar to the issue of the writ against him, (ii) that an applicant may go from one Court to another until he obtains his writ, and (iii) that when he has done so, and any Court has pronounced in favour of his liberty, there is no appeal against the order. The unsolved mystery in the case is, how the Divisional Court came to the conclusion that it ought to refuse a rule *nisi*.

#### ‘ MARTIAL LAW ’

Before leaving the fundamental right of the subject to be governed according to law, it is necessary to refer shortly to the alleged existence, from time to time, of a state of affairs which is, *primâ facie*, a complete denial, at least for the time being, of that right. This state of affairs is said to be brought about by a ‘ proclamation of martial law,’ or, as it is frequently described in Continental cases, a ‘ suspension of constitutional guarantees.’

No such state of things is provided for by English Constitutional Law. On the contrary, it is expressly forbidden and excluded by a clause of the famous Petition of Right of 1628, which is applicable at all times, without limitation to time of peace. It is true that, if it chooses, Parliament may suspend the working of the remedy of Habeas Corpus by an Act expressly passed for that purpose ; but the Executive alone can take no such step, and, as a matter of fact, the Habeas Corpus has not been suspended in England during the last century, not even during the Great War. And even a suspension of the Habeas Corpus



would not repeal the Rule of Law, though it would, undoubtedly, weaken it.

In truth, when applied to England, the so-called 'proclamation of martial law' is little more, as regards form, than the reading of the proclamation contained in the Riot Act of 1714, previously explained, (which certainly has not the legal effect of wiping out the Rule of Law), and, as regards substance, an organized attempt, on the part of the Crown, to put down disorder. As we have seen, all persons—at any rate all male persons—are liable, whether they are soldiers, sailors, police, or private persons, to come to the aid of the Crown in such a task. But, in doing so, they must use no more force than is reasonably necessary to effect the lawful object of putting down disorder; and this necessity will be judged in the ordinary way, by a jury, on a prosecution or action by the subject alleged to have been illegally treated during the process. Here again the Rule of Law, that a person prosecuted or sued for a breach of the law cannot plead superior orders as a defence, will apply; and this rule may place in a very awkward dilemma such persons, e.g. soldiers and sailors, as are subject to two systems of law, viz. the Common Law, and the special system known as Military Law, enforced under the provisions of the Army Act and the Naval Discipline Act. As it has been crisply put, such a person may have to take his choice between disobeying his officer's order to shoot, which may mean that he himself will be liable to be shot for disobedience, and obeying it, at the risk of being hanged for committing murder. But the fact that the Rule of Law may work harshly in certain cases is no solid ground for depriving the subject of the protection of it. The proper ways in which to mitigate the severity of the Rule in favour of honest mistake, are the exercise of the royal prerogative of pardon, or the passing of an Act of Indemnity. Very prudently, however, Parliament has, by enacting the Emergency Powers Act of 1920, made provision for the treatment of civil disturbances and dangers in a fashion characteristically legal and characteristically

English, which will probably, in the future, if civil disturbances should, unhappily, arise, render the old-fashioned 'proclamation of martial law' unnecessary.

2. *Protection from personal violence.*—The duty of the Crown to protect its subjects against violence is the counterpart of the subject's liability to aid in suppressing disorder. From ancient times the hundred, an unit of local government intermediate between the shire and the township, was liable to those persons who suffered in their property by rioting, or by the barbarous practice of 'wrecking,' i.e. the luring of storm-bound vessels on to dangerous rocks and the plundering of shipwrecked mariners. The liability was placed on a systematic footing by statutes of the years 1827 and 1832, at the time of the machine riots; but it was transferred to the police district by the Riot Damages Act of 1886. We have also seen how the Crown freely places its name at the disposal of its subjects for the purpose of instituting and carrying on criminal proceedings for injuries suffered from violence. But perhaps the most accurate view that can be obtained in a brief time on this important right of the subject to protection against disorder, will be gathered from a short account of a case which was tried in the year 1924.

In 1921 there had been a big colliery-strike in South Wales. Messrs. Glasbrook Brothers were colliery owners in that district, and were nervous about the behaviour of their men, with whom they had had a wage dispute after the general settlement of the strike in their collieries. The committee of the operatives threatened to withdraw the 'safety men' at Messrs. Glasbrook's mines; and the firm requested police protection, in the special form of one hundred constables billeted at their colliery. The police superintendent expressed his complete readiness to afford all necessary protection, but declined to billet more than seventy men at the colliery, and that only on Messrs. Glasbrook undertaking to pay for their services. To this demand Messrs. Glasbrook's manager reluctantly agreed; but, after the disturbances were over, they refused to make good the undertaking, on the ground

that, in protecting their colliery, the police were but doing their ordinary duty of protecting peaceful subjects against violence. Thereupon the County Council, the body responsible for the police finance, sued them, and obtained judgment for over £2,000. On appeal, the Court of Appeal confirmed the judgment of the trial judge, but only by a majority, whose view is, perhaps, best put in the words of Lord Justice Scrutton: "While the subject should be protected by the State, the State is entitled to expect the subject to show reasonable self-control and courage." Lord Justice Atkin, who differed from the majority of the Court of Appeal, took the view, that either the demand of Messrs. Glasbrook for special protection was unreasonable, in which case the police authorities should not have acceded to it, or that it was reasonable, in which case they were not entitled to charge for it. Perhaps the net result of the decision is, that the subject's right to protection against disorder is genuine but imperfectly safeguarded.

3. *Freedom of speech and writing.*—Freedom of speech is often claimed as a right of the subject; and there is a meaning in which the claim is sound. There is no censorship of the Press in England. The subject speaks and writes at his own risk. Furthermore, Members of Parliament, speaking in Parliament, are, by the Bill of Rights, specially protected against all proceedings, civil and criminal, outside Parliament, in respect of words spoken therein; and there are, as we shall see when we come to treat of the Law of Libel, various other privileges, absolute or qualified, which can be used as defences in proceedings for defamation. One of these which is specially material at this point, is that known as "fair comment on a matter of public interest and importance," which goes far to protect freedom of discussion on public affairs. Perhaps this is all the claim to freedom of speech and writing amounts to. If so, it seems reasonably well-based. But it would be a great mistake to suppose that the Englishman can speak and write what he likes, even about public affairs. We have already heard of sedition and seditious



libel as criminal offences ; and we shall see later that the dangers to speakers and writers of an action for defamation are considerable. Moreover, even this liberty of speech does not extend to dramatic performances ; for not only must every theatre-proprietor exhibiting plays for money have his theatre licensed either by the Lord Chamberlain or the magistrates, but he must not, under serious penalties, exhibit a play which has not received the previous approval of the Lord Chamberlain.

4. *Freedom of meeting and association.*—The law on these subjects is on a similar footing to that affecting freedom of speech and writing. A meeting which has an illegal object is an ‘unlawful assembly,’ which, as we have seen, is a common law misdemeanour ; an association having an illegal object is a criminal conspiracy, *per se*, and, as such, any one taking part in it is guilty of a misdemeanour. It required a definite statutory enactment to relieve the members of certain Trade Unions, as such, from liability to prosecution for criminal conspiracy, because one of the avowed objects of the Unions was to restrict freedom of trade and industry. A public meeting, lawful though its object be, which obstructs a public highway, is a common nuisance, and, therefore, criminal ; while the persons attending a meeting held on private property without the permission of the occupier are severally guilty of trespass, and can be sued for damages. Subject to these liabilities of the ordinary law, however, there is no prohibition by English Law of free association and meeting ; and, as a matter of fact, thousands of voluntary associations exist in England for all conceivable purposes, and thousands of meetings, public and private, are held annually, for all kinds of objects. The State looks on at these proceedings, usually with complete indifference, occasionally with benevolence. By the Public Meeting Act of 1908, any one who, at a lawful public meeting, acts in a disorderly manner for the purpose of preventing the transaction of the business for which the meeting was called together, is guilty of a summarily punishable offence, which is made more heinous if it occurs at a political



meeting held during a Parliamentary election. But there is no express guarantee in the Constitution of the rights of association or meeting.

5. *Freedom of movement*.—Subject to the provisions of the ordinary law protecting private property, the subject not under restraint in consequence of proceedings for a criminal or other offence, may go where he likes, within the realm or without, and need ask no one's permission. He cannot be banished from England, except under the provisions of an Act of Parliament (such as the repealed Transportation Acts); and he cannot be prevented from leaving the country, unless he is fleeing from justice, except in the rare cases in which the writ of *ne exeat regno* may be granted, on the application of a creditor, to prevent a debtor prejudicing his claim by leaving England. As a matter of law, it is very doubtful whether the familiar process of demanding the subject's passport on embarkation for a foreign country could be enforced; but the benefits derived from the possession of a British passport in foreign countries are so substantial, that the owner is not likely to make trouble about formalities. As service in the armed forces of the Crown is entirely voluntary, no Englishman carries identification papers. With aliens, the case is, of course, entirely different. They have no right of admission to the country; and, as a matter of fact, the Aliens Restriction Act of 1914, and the Orders thereunder, impose substantial conditions on the entry and residence of aliens.

6. *Education*.—Ever since the year 1870, the State has taken upon itself not only to provide for, but to enforce upon, the subject in his youthful years, a certain amount of elementary education. Inasmuch as the person for whom the benefit of this provision is intended is apt to be a little indifferent to his valuable rights, these are enforced by imposing a liability on his parents or guardians to compel his attendance at school during the prescribed period, which now, in normal cases, lasts until the age of fourteen. The whole cost of this provision, as also, to a large extent, of the optional State provision of higher

education, has been gradually removed from the shoulders of parents, and is shared between the taxpayer (by means of Treasury grants) and the ratepayer, who are usually the same persons. The actual administration is with the local authorities who are elected by the ratepayers; but a vigilant Board of Education controls the disposition of the Treasury grants, and, by means of its Regulations and Inspectors, exercises a substantial influence upon State education.

7. *Maintenance*.—Ever since the close of the sixteenth century, the State, through the local authorities, has acknowledged its liability for the bare necessities of life of the indigent and impotent poor. The history of the Elizabethan Poor Law of 1601 is a melancholy example of good intentions marred by individual selfishness and incapacity. The great condemnation of it is that, after costing the country untold millions, and nearly reducing it to bankruptcy, so far from awakening in the minds of those who were supposed to benefit by it the slightest appreciation of its merits, it was regarded with indignation and loathing as inflicting upon them an indelible stigma of reproach. The great reforms of 1834 did somewhat to redeem the situation, at any rate from the economic point of view; but, after a trial of nearly a century, they too, it is agreed, are doomed shortly to perish, their place being taken by the newer forms of State welfare-legislation which have come into existence during the present century.

### OLD AGE PENSIONS

The first of these is the Old Age Pensions scheme, inaugurated in 1908, which provides, under certain conditions, at the age of 70, for all British subjects resident in England whose means are below a certain amount, a free non-contributory pension, graded according to the recipient's other income, but with a maximum of ten shillings a week. It is a condition of eligibility that the income of the recipient from other sources shall not exceed

£49. 17s. 6d. a year ; but, to encourage thrift, the first £39 from investments is not included in this reckoning. No certificate of previous industry or character is required to give a title to the claimant ; but actual inmates (for serious offences) of a prison, or of a workhouse or lunatic asylum, are debarred from claiming. Persons insured under the National Insurance schemes shortly to be described, and their wives, are, subject to certain restrictions, entitled to Old Age pensions at 65 ; but these are on a contributory basis. Old Age pensions are paid through the Post Office. In the year 1926, they cost the State almost thirty millions sterling.

### NATIONAL INSURANCE

The system of National Insurance which dates from the year 1911, is a much more ambitious attempt on the part of the State to contribute towards the physical needs of the subject. It is divided into the two great branches of health and unemployment ; but both spring from the same trunk of employment in industry.

### HEALTH

The health provisions of the scheme, which were consolidated in 1924, normally apply, from the age of sixteen, to all persons employed in manual labour, and all persons otherwise employed at a remuneration not exceeding £250 a year ; but there are numerous exemptions, and also possibilities of 'voluntary insurance.' The scheme is contributory ; thirteen pence halfpenny a week being paid for males and thirteen pence for females, of which the employer pays four pence halfpenny and the employee nine pence and eight pence halfpenny respectively. For this the insured person gets (i) medical attendance (i.e. treatment by a 'panel doctor') in illness, (ii) sickness benefit for 26 weeks (fifteen shillings for males, twelve for females), but only after 26 weeks' contributions have been



paid, (iii) disablement benefit if the illness continues longer, but not until two years' contributions have been paid, and (iv) maternity benefit of forty shillings if forty-two weeks' contributions have been paid. The State makes up the deficiency to the extent of two ninths as against the seven contributed by employers and the insured persons; and the whole goes into a National Health Insurance Fund, which at present has a very large balance.

### UNEMPLOYMENT

Unemployment insurance is regulated mainly by the provisions of an Act of the year 1920, as amended by another of the year 1927, passed in consequence of a Report of a Committee of Enquiry. It is administered by the Minister of Labour, whereas Health insurance is administered by the Minister of Health. It does not apply to agricultural or domestic employees, nor to casual employees, nor, any more than Health insurance, to non-manual employees earning more than £250 a year. Its scope is, therefore, more restricted than that of Health insurance. The weekly contribution to the insurance fund is fifteen pence for males and thirteen pence for females, of which the employer pays eight pence and seven pence respectively, or, if the insured person is between sixteen and eighteen, seven pence halfpenny for boys and six pence halfpenny for girls, of which the employer pays four pence and three pence halfpenny respectively. The State provides rather less than one-third of the total cost. The 'benefit' on inability to obtain employment is, for males seventeen shillings a week and for women fifteen (boys six and girls five shillings). The amending Act of 1927 has introduced a new class of young men and women (18-21), whose rates differ somewhat from those of the above classes. Benefit carries allowances of seven shillings a week in respect of adult dependants, and two shillings in respect of each child under fourteen.



Owing to the abnormal circumstances following the Great War, unemployment insurance has hardly had a chance to make good ; and there is a large deficiency in the fund.

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It must be admitted that the remedies of the subject for breach of his right of maintenance by the State are, for the most part, of that unsatisfactory kind known as 'administrative.' Though there are cases of the issue of a writ of Mandamus against Poor Law Guardians, apparently none of them turn on a refusal to grant relief. Justices of the Peace are still, apparently, entitled to order the payment of out-relief to aged and infirm persons, under the provisions of the Poor Law Amendment Act of 1834. There are various committees in connection with both Old Age Pensions and National Insurance, which are supposed to guard the interests of intended beneficiaries of these schemes. But, for the most part, the remedy of any person who is denied his rights is to complain to the Government Department in charge of the scheme, i.e. the Ministry of Health or the Ministry of Labour, whose Inspectors and other officials exercise considerable critical control over the working of the local authorities and 'approved societies' to whom the payment of benefits is entrusted. Finally, in cases of obstinacy, there is the very useful power of getting questions asked in Parliament on any alleged dereliction of duty on the part of either the central or the local authorities. It is easier than might be supposed, for even a humble applicant to get such a question put.

8. *Influence on government.*—This brings us, naturally, to the last, but, in some ways, the most important of all the rights of the subject in English Law, viz. the right to exercise an influence, direct and indirect, upon the policy and administration of the government of his country. So far as his direct influence is concerned, the ordinary subject exerts it only at intervals, through the exercise of his various Parliamentary and municipal franchises. It is admitted that these cannot be claimed by every adult

subject ; but it would not be possible here to go into the details of the rules by which they are vested in an ever-increasing portion of the members of the community. No longer, as before the Reform era, the cherished and often-abused privilege of a comparatively few persons, the parliamentary and municipal franchises are now, under the Representation of the People Act, 1918, easily obtainable by the average subject of either sex ; the chief difference between men and women being that, while the former are qualified for the Parliamentary franchise at the age of 21, the latter only attain it at 30. The danger is, indeed, rather that the exercise of this important trust shall, by reason of its very frequency, become ineffectual. But this result is, to a large extent, avoided by the system of party organization, which is, again, too technical and complicated a subject for discussion here. Shortly it may be said, that a person of ability who is interested in public affairs, however humble his social and industrial position, can, if he chooses to take full advantage of the opportunities open to him in this direction, reasonably hope to exercise a real and direct influence on the conduct of government, either as an elected member of the House of Commons or a local authority, or as a party organizer or official in his own constituency. This influence has, of course, a strictly legal basis, being protected in the Courts of Law by an enforcement of the Franchise Acts, and the rights, before explained, to liberty of speech, writing, meeting, and association, within the limits of law.

The indirect influence of the ordinary subject on the administration of government is by means of his elected representatives in the House of Commons. Not only is the legislative programme of the Government largely influenced by the attitude of such representatives, themselves keen to notice the tendencies of opinion among their constituents ; but, what is, perhaps, more important, its daily conduct of affairs is influenced by the process of addressing questions to Ministers, now a recognized and vital part of Parliamentary machinery. No Minister is

indifferent to complaints against the conduct of officials for whom he is responsible. His reputation as an administrator, and much of his future career, depend upon the efficacy with which he reduces the inevitable number of complaints which find their way into the daily Question List of the House of Commons. And his subordinates know that nothing is more likely to prejudice their chances of promotion, than the fact that their Chief has been compelled to apologize for their mistakes to an unsympathetic House of Commons. Here, doubtless, is a right which would not satisfy the rigid Austinian definition ; but it is a right which no English Government would dare to question.





PART IV  
*THE CRIMINAL LAW*



## CHAPTER XIII

### GENERAL PRINCIPLES

WE have seen, at an earlier stage, that the legal distinction between criminal and civil proceedings is, that the former are always carried on in the name of the Crown. This is, obviously, a very technical distinction, depending upon questions of mere procedure. But when we try to discover what is the difference in substance between Criminal and Civil Law, i.e. why should a particular offence be classed as a crime rather than a mere civil wrong, we find it hard to give a satisfactory answer to the question. Perhaps the best answer is to say, that any offence which, in the opinion of the community, deserves *punishment*, as distinct from the mere award of compensation to the injured party, should be regarded as criminal, and be made the subject of the Criminal Law. But when we ask ourselves what exactly do we mean by 'punishment,' we again find it hard to define it except as something other than mere compensation—i.e. the restoration of the injured party (so far as possible) to the position which he occupied before the commission of the offence in question.

This admittedly unsatisfactory result is probably due to the fact, that men's views as to the object or justification of punishment are constantly changing. Originally, perhaps, regarded as a means of averting the wrath of Heaven from a community polluted by the offence, later as a process of gratifying the vengeance of the injured party and his kindred, later still as a sort of compensation to the community for the distress and shock caused by the offence, later, again, as a purely utilitarian means of preventing the repetition of the offence by striking terror into the minds of possible imitators, last of all, as a means

of reforming the offender—a historical system of law like the English bears traces upon it of almost all the stages through which the justification of punishment has passed. Of these we shall have to say something more when we come to describe the actual punishments inflicted by English Criminal Law. Here it is only necessary to add, that the difficulty of finding a substantive or essential distinction between Criminal and Civil Law is enhanced by the fact that, in English Law, some unlawful acts, e.g. assault, libel, burglary and house-breaking, embezzlement, and many others, are both crimes and civil offences, and, subject to the question of priority previously alluded to, can be made the subject of both criminal prosecution and of civil action. It has been suggested by an eminent authority, that the real distinction between criminal and civil offences is that, in the case of the former, the Crown has power to remit the penalties, while it has no power to waive the compensation due for the latter. That is, in the main, in accordance with the rules of English Law ; but it does not seem to carry us very far in our search for the true nature of Criminal Law.

We may perhaps, however, make some little progress if we turn to the attempt made by Blackstone, in his famous Commentaries, written now nearly two hundred years ago, to define the essential nature of a crime. Blackstone is speaking of the capacity to commit a crime ; and he attributes the incapacity which English Law recognizes in certain cases as due to this single consideration, “the want or defect of *will*.” And, a few lines later, he states that “to constitute a crime against human laws, there must be, first, a vitious will ; and, secondly, an unlawful act consequent on such vitious will.”

Now Blackstone was not a clear thinker (he speaks, for example, in the same passage of an ‘involuntary act,’ which is a contradiction in terms) ; but he reflected very faithfully the most influential legal thinking of his day. And it is quite certain that, for a long time, English law clung to the view that every crime involved moral guilt of a substantial kind. Criminal Law dealt only with



offences which were *mala per se*, not with offences which were merely *mala quia prahibita*. This view is expressed in the adopted maxim: *Haud reus nisi mens sit rea*; and the doctrine of the *mens rea* has left definite though not very consistent traces in modern Criminal Law. At the same time, the immense increase in modern law of petty police offences involving no serious moral guilt has altered profoundly the scope of the doctrine of the *mens rea*, and has, indeed, given it quite a new meaning. Let us consider for a little how far a mental element is necessary to constitute a crime in modern English Law.

Offences consist either of acts or omissions. For many centuries English Criminal Law, like all primitive systems, concerned itself mainly, if not exclusively, with the former. The earliest crimes known to it were murder, arson, rape, robbery, child-stealing, burglary, and the like; not merely acts, but acts which can hardly be committed thoughtlessly, in a moment of abstraction. Moreover, like all acts, they implied an intention, i.e. an anticipation of certain consequences, and a belief or desire that the acts in question would, or should, produce them. As these consequences were all flagrantly evil, the special form of intention necessary to produce them came to be called 'malice' or wickedness; and an accusation of 'malice' was to be found in every criminal indictment. Perhaps it was put there rather to prejudice the jury against the accused, than with any definite idea of a specific legal doctrine. Nevertheless, it undoubtedly strengthened the theory that, to incur liability for a crime, the accused must have been guilty of some state of mind called 'malice.' This view was explicitly adopted by Chief Justice Kenyon in the year 1798, when he refused to disturb the verdict of a jury for damages against the creditors of a bankrupt who had seized his goods on the plea that their debtor had committed an act of bankruptcy by shutting up his house and going to London. The short passage is worth quoting, for more than one reason. "Bankruptcy is considered as a crime," said his lordship; "and the bankrupt in the old laws is called an offender. But it

is a principle of natural justice, and of our law, that *actus non facit reum nisi mens sit rea*." As a matter of fact, the poor man had gone to collect some debts which were due to him, in order to satisfy his own creditors. He had clearly intended to go to London; but he had not intended to defeat his creditors thereby. This case will, perhaps, give us the key to the solution of our difficult question: How far is intention necessary to the commission of a crime?

The answer to the question is to be found in the very interesting case of Tolson, decided in the year 1889, by a majority of nine judges to six. Mrs. Tolson honestly and reasonably believed her husband to have been drowned on a voyage to America. After six years she married again. Twelve months later her husband reappeared; and she was indicted for bigamy under a statute which described bigamy as (in effect) the contracting of a second marriage during the lifetime of the 'former' husband or wife, and went on expressly to exempt the person who married without having had any news of his or her absent spouse for seven years continually. This last exemption was the great difficulty in the case; for it looked as though the legislature had anticipated the defence of ignorance, and provided that it should not prevail until after a lapse of seven years. Nevertheless, the Court, in spite of the express words of the statute, quashed the accused's conviction, on the ground that she had no guilty intention. As Mr. Justice Cave said: "At Common Law, an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the prisoner is indicted an innocent (i.e. morally innocent) act, has always been held to be a good defence." This distinguishes Mrs. Tolson's case from one decided fourteen years before, in which an overwhelming majority of a similar Court, despite the powerful dissenting judgment of one of their number, had decided that a man who was indicted under a statute which made it a criminal offence to take away an unmarried girl under the age of sixteen from the possession of her father, was guilty;

though in fact he reasonably believed the girl to be (as she asserted herself to be) over sixteen. In any case, the accused knew that he was doing something immoral. These two cases appear to explain the meaning of the phrase *mens rea*, and to show that if, owing to mistake or incapacity of mind, an accused person believes the facts to be such that his act is not only not unlawful, but also morally innocent, he is entitled to be acquitted. The only two reservations on this doctrine necessary are (i) that a statute may, of course, make it clear that nothing but its literal words are to be followed, and that a perfectly undesigned and morally innocent breach of it will justify conviction, and (ii) that no mistake arising from ignorance of the law is any excuse. For example, where a man who had obtained a decree *nisi* for divorce against his wife, married again before it was made absolute, he was held guilty of bigamy; though he honestly believed himself entitled to re-marry.

The position is more difficult when we consider the question of criminal negligence, i.e., not an act, but the omission to do an act, the duty to do which is imposed by the Criminal Law. Such cases are rare; most of the so-called cases of criminal negligence being cases of acts in which the accused pleaded, in effect, no *mens rea*, but was defeated on the ground that he omitted to take reasonable precautions to avoid evil results. Here again, the association of the plea with such results naturally gives rise to the idea that 'negligence' is an immoral state of mind. But if the accused is charged purely and simply with the omission of a duty, is it a defence to say that he had no guilty mind? Probably yes; unless the offence were statutory and the words of the statute were so rigid, that no escape was possible. Thus, suppose a woman to be indicted for causing the death of her child by neglecting to provide it with food, and it was proved that she had, as she honestly and reasonably believed, made arrangements for its care, it would hardly be possible that she could be convicted of manslaughter, far less of murder. This view is confirmed by the fact that,



in the comparatively few statutes creating offences for criminal omissions, these are nearly always described as "wilful"; while the decisions on common law charges, though not entirely consistent, seem to show that a conviction for a criminal omission is only justified where the accused has been guilty of, at the least, gross carelessness.

We may now apply the conclusions at which we have arrived to the special cases of alleged incapacity to commit crimes owing to absence of *mens rea*. We have already considered the cases of infants and what may be called 'general' lunatics. We have now to deal with cases of special mental defect, drunkenness, duress, and the peculiar case of the corporation, or legal person.

(i) *Mental defect*.—Though a person may not be so generally defective in mental power as to warrant his being treated as a lunatic, he may yet suffer from isolated mental delusions which affect his position in Criminal Law. The leading authority on the subject is that of McNaghten, who, in 1843, shot at and killed Mr. Drummond, the Prime Minister's secretary, in the belief, as the jury found, that he (Drummond) was the Prime Minister and that he (McNaghten) had a divine mission to kill the Prime Minister. In one of the very few extra-judicial opinions of the judges recorded in the books, Mr. Justice Maule and Chief Justice Tindal (who delivered the opinion of himself and the rest of the judges), laid it down, in answers to questions proposed to them by the House of Lords, that a person accused of crime could not be acquitted on the ground of insanity, unless his delusion were proved to be such that it prevented him knowing the nature of the act which he did; or, if he did know it, that he did not know that what he was doing was wrong. It may well be doubted whether, at the present day, a person putting forward such a defence as McNaghten's could be acquitted; but the principle adopted in the opinions of the judges in that case appears to be still good law.

(ii) *Drunkenness*.—The analogy between drunkenness



and mental delusions is so obvious, that it is natural to consider it next. But there is one important difference between the two which profoundly affects the question of guilt, viz. that drunkenness is (in the great majority of cases) produced by the accused's own acts which, if they are not actually illegal, are at least immoral. *Primâ facie*, therefore, there is evidence of wrong-doing in his case; and it would appear to be a sound principle, that a man should not be allowed to plead his own wrong-doing as a defence, though it may well disprove a particular intention necessary to constitute a given crime. Thus, while it would appear to be a good defence to a prosecution for assault with intent to rob that the accused was so drunk that he thought his blows, inflicted with a hatchet, were aimed at a lamp post, not a human being, yet there would appear to be no reason for acquitting him of assault, or of murder, if death resulted to his victim. Notwithstanding, the public in 1909 was startled to learn that it had been laid down by the Court of Criminal Appeal, that a prisoner may be acquitted of murder, on the ground that he was too drunk to know that what he was doing was dangerous to human life. This doctrine was, however, modified by the highest tribunal in 1920, when the House of Lords, in *Beard's case*, restricted it to the cases in which a specific intention, in addition to the guilty attitude of mind, is required to constitute the crime, and the existence of the specific intention is inconsistent with the accused's state of mind.

(iii) *Duress*.—Duress, or constraint, may be of two kinds, physical and mental. The fact that a person accused of crime was physically compelled to do it by superior force is, of course, a complete defence to the charge. If A's hand is violently seized by B, a man of superior strength, a revolver fitted into it, and A's fingers compelled to fire a shot which kills C, A is not guilty of the murder of C. In fact, the shooting is not his act. But the cases of mental constraint are more difficult. If two shipwrecked men are clinging to a spar which will, manifestly, only support one, is either of them excused

of murder if he pushes the other off into the sea and thus causes his death by drowning? Authorities differ. On the one hand it is urged that a person is justified in doing any act to save his own life, unless it has been jeopardised by his own illegal act. But this is a dangerous doctrine, and has been repudiated by the only reported decision on the point in recent years, the *Mignonette case*, in which shipwrecked sailors were alleged to have killed a companion and eaten his flesh to save themselves from death by starvation. A Court of five judges pronounced the accused guilty of murder. The difference between such an excuse, and true self-defence, is obvious. In the latter case, the victim was the first aggressor; in the former he is an innocent person. On the other hand, where the crime which the accused has been constrained to do is comparatively venial, and reparation can be made for it, it seems difficult to deny that a man may save his life by committing it. If a revolver is held at a man's head, and he is told that unless he forges A's name to a cheque he will be shot dead, and he reasonably believes that the threat will be executed, it seems difficult to think that he could be convicted of forgery.

One definite instance of coercion is clearly admitted by the law as a good defence. Till recently, it was an irrebuttable presumption that a woman who committed certain classes of crimes in the presence of her husband was acting under his coercion; and she was entitled to be acquitted. By the Criminal Justice Act, 1925, this presumption is abolished; but it is a good defence for the woman, except in a case of treason or murder, to prove that she was, in fact, coerced by her husband, in whose presence the crime was committed.

(iv) *Corporations*.—Finally, there comes the very difficult question of the criminal responsibility of the juristic person. Where the offence alleged involves no mental element beyond the mere intention to do the prohibited act, there seems to be no reason why a corporation should not be convicted of it, e.g. where it consists of exposing for sale provisions unfit for human consumption. Such convic-

tions have, in fact, been made. But, where the offence involves *mens rea*, it is difficult to see how a corporation can be convicted, though it has been suggested that it might be made criminally liable for the acts of its servants or agents. But this latter suggestion, again, is quite inconsistent with the personal and punitive character of Criminal Law. Again, a corporation can, no doubt, be fined ; but it can hardly be hung or put in prison. On the other hand, a corporation (at any rate a corporation aggregate) can only act through agents ; and these agents, whether controlling persons like councillors and directors, or mere servants of the corporation, are, of course, criminally liable for the acts in which they engage, and can be physically punished. Those who are inclined to pursue further the very interesting questions raised by this subject, should study the proceedings in the Poplar Borough Council Case, decided in 1921, though that was only technically a criminal case.

### DEGREES OF CRIMINALITY

Closely associated with the doctrine of *mens rea*, is the fact that the Criminal Law recognizes degrees of criminality. Partakers in a crime may be either principals or accessories ; and principals may be either in the first or the second degree, while accessories may be either before or after the fact. But these distinctions are largely academic. A principal in the first degree is the person who actually did the criminal act or was guilty of the criminal omission, either with his own hand or through an innocent agent, e.g. a child. A principal in the second degree is a person who, without actually taking part, is present at the commission of a crime, and encourages and assists in preparation for it, e.g. a man who entices away a dog left to guard a house whilst his confederate robs it. An accessory before the fact is one who, without being present at its commission, advises or procures it to be done, and does not countermand it before it is done. All three



are liable to the full penalty for the crime. An accessory after the fact to a felony (in treasons and misdemeanours all are principals) is one who relieves, comforts, and assists or permits the escape of, the felon. Such accessories after the fact are, in murder cases, liable to penal servitude for life, in other cases to two years' imprisonment; and they may be convicted even though the principal has not been brought to trial. But again a woman cannot be convicted of being an accessory after the fact, merely for concealing her husband or aiding his escape. All accessories after the fact are guilty of felony.

Besides gradations of criminality, English Criminal Law recognizes gradations of crime. The nature of the full crimes recognized by it will be the subject of future chapters. Here we may say a word about the minor gradations of attempts, incitements, and conspiracies to commit crimes.

An *attempt* to commit a crime is a commencement of a series of acts which, if carried to their natural conclusion, would result in the commission of the crime. Clearly an attempt implies an intention—it may, in fact, be said to be intention in action. In theory, therefore, it is clear that any overt act committed after the intention to commit the full crime has been formed is an attempt to commit it; and, in practice, that is the rule followed, though there are occasional difficulties in its application. The fact that an attempt is frustrated does not, of course, prevent it being an attempt; but it has been ingeniously argued, and sometimes held, that an attempt which could not possibly have succeeded, is not a criminal attempt. For example, it was once held that a person could not be convicted of attempting to steal from an empty pocket. But that decision has been overruled. The sound principle appears to be that, if the accused has done anything to qualify himself for the full crime, on the facts as he believed them to be, then, the mere fact that, owing to circumstances over which he had no control, his attempt proved impossible of fulfilment, should be no excuse. It has even been laid down that, though the accused abandoned his attempt in time to avoid the commission of the full crime,



he could be convicted of an attempt to commit it, as where the accused lit a match to set fire to a haystack, but, observing that he was watched, blew it out before applying it to the stack. There would appear to be no doubt that an attempt can take the form of an omission as well as an act, e.g. an attempt to commit suicide by abstaining from food.

Many attempts are treated as full crimes, in the sense that special punishments are awarded in respect of them by the Criminal Law. When this is not the case, an attempt to commit a crime is a misdemeanour at the Common Law.

Any *incitement* to commit a crime is also a common law misdemeanour. An incitement may, of course, take many forms ; but it is distinguishable from accession before the fact, and from attempt, in that the inciter takes no physical part in the preparation for the crime. But in truth, as was said by more than one of the judges in the leading case on the subject, an incitement or solicitation is an act, and, therefore, hardly to be distinguished from an attempt. The difference appears to be that, as it must always involve the intervention of an intermediary, who may resist the incitement, it is less likely than an attempt, in the ordinary sense of the word, to result in the commission of the full crime.

A conspiracy to commit a crime is in itself a crime ; and it is a misdemeanour unless directly made a felony by statute, whether the crime contemplated is actually committed or not. It is even said that the agreement to commit an act which, though not in itself criminal, is admittedly immoral, is a criminal conspiracy ; though the accused could not be punished for the act contemplated. The familiar example given is the case of a conspiracy to seduce a woman ; and there appears to be no doubt that it is correct.

A conspiracy cannot be committed by one individual.

### CLASSIFICATIONS OF CRIMES

Finally, the Criminal Law adopts certain classifications of crimes, which are of some practical importance. We may refer to three of them.

Crimes are classed as treasons, felonies, and misdemeanours. This is a historical classification, which was at one time of overwhelming importance, but has now lost much of its weight. Putting aside treason, which has already been dealt with, we may say that felonies were those crimes a conviction for which, before 1870, involved the forfeiture of the convict's property, and, until the beginning of the nineteenth century, involved also his capital punishment, except in the rare cases when a statute expressly provided otherwise. All other crimes are misdemeanours.

Despite the removal of the chief features which formerly distinguished felonies from misdemeanours, there remain some of considerable importance. Thus, for example, conviction for felony incapacitates the convict from holding many public offices, and deprives him of many public emoluments; the Court may, on the application of any person aggrieved by the felony, award compensation to such person, up to £100, out of the convict's property; the clauses of the Forfeiture Act which confiscate a convict's property apply only to persons convicted of treason or felony; gradations of criminality are, as we have seen, recognized only in felonies; persons committing or preparing to commit felonies may be arrested by private persons without warrant; bail may be refused by the examining magistrates to a person accused of felony; if a civil action is brought against a person for a tort which is also a felony, the Crown may, as we have seen, stay the action till the question of criminal liability is settled; peers accused of felony are entitled to be tried by their fellow-peers; peremptory (i.e. unexplained) challenges of jurors are only possible in prosecutions for felony; the provision of the Habeas Corpus Act, previously referred to, guaranteeing the accused a speedy trial, only applies to persons accused of treason or felony.

A second classification of crimes is purely procedural; and we have already explained it. It is the classification into indictable offences and offences punishable on summary conviction. This classification has largely super-

seded the older classification into felonies and misdemeanours ; but we have already dealt with it sufficiently.

The third and last classification of crimes familiar to students of English Criminal Law is based on the immediate objects of those who commit them. Thus we have crimes against bodily security, crimes against property, crimes against religion and morality, crimes against the reputation. Crimes against the State and Public Order have already been dealt with. The other four classes must now be treated separately.

## CHAPTER XIV

### CRIMES AGAINST BODILY SECURITY

OF these by far the most important is **HOMICIDE**, or causing the death of a human being.

Not all homicides are, of course, unlawful. The executioner who carries out a death sentence lawfully pronounced, the surgeon who, in the careful and skilful performance of a dangerous but necessary operation, causes death, are but performing their duty. The driver of an express train who kills a careless or unlucky pedestrian who has strayed on to the railway line at night, is by all legal and moral standards guiltless. The death is, in the popular, if not in the scientific sense, 'accidental.' The constable or the private citizen who, in the exercise of his undoubted duty of preventing the commission of a felony, or in self-defence, takes the life of a human being, commits justifiable homicide. A man, overcome by sudden passion at the sight of some grievous wrong being done to his honour, who assaults and kills the wrong-doer, is, in certain very rare cases, held to be excused rather than justified ; but the excuse will only reduce the offence from murder to manslaughter.

All these kinds of homicide, however, though technically guiltless, yet raise a case for enquiry, and are, as a fact, dealt with by what is known as a coroner's inquest, a very ancient institution, dating at least from the thirteenth century. Whenever a sudden or mysterious death occurs, it is the duty of the coroner (a local government official of a county or borough) to hold an inquest, usually with a jury of not less than twelve and not more than twenty-three good and lawful men, as to the circumstances of the death. No one is accused by the inquest ; and no one who is not summoned as a witness or juror need attend unless he pleases. Coroners' inquests quite frequently result



in verdicts of 'Accidental Death,' 'Death from Natural Causes,' and the like. But it is open to the jury to return a verdict of culpable homicide against any person whom they choose to name; and if they do, that person will be taken into custody, and can, in theory, be sent for trial on this verdict. It is now, however, usual for him to be taken before a magistrate in the ordinary way, for the preliminary examination of the charge. If the magistrate decides to commit, the accused goes for trial on the commitment; if he decides that there is no case for committal, it is not usual for the verdict of the coroner's jury to be enforced, and by a recent statute, if magisterial proceedings are taken against a suspected person pending the inquest, the latter is adjourned until they are concluded.

Culpable homicide is of two kinds: Murder and Manslaughter.

MURDER, the most serious crime (after High Treason) known to English Law, is defined as 'wilful homicide with malice aforethought'; but this definition, which is not statutory, though helpful, requires some explanation, if the true legal nature of murder is to be understood.

It is, perhaps, necessary to premise, that murder may be committed without any direct contact between the murderer and his victim, and even without the exercise of force. The man who sends poisoned chocolates by post, intending them to be eaten by the recipient, the man who induces another to go up a staircase knowing that it ends in an unguarded space over a precipice or river, is guilty of murder if his plot succeeds.

In these cases there is, of course, deliberate intention to cause the victim's death. But recklessness so gross as to be practically indistinguishable from intention is equally adequate to convict of murder; as, for example, if a man were to fire a machine gun at a crowd, reckless whether he killed any one or not, and death ensued. And so, but for the extraordinary timidity or favour shown by the Courts to motorists, would be the result, if a motorist recklessly, in his desire for speed, dashed into a crowded street regardless of the safety of pedestrians.

Thirdly, it will already have appeared, that, though intention to cause, or reckless indifference to, the death of a human being is sufficient evidence of 'malice' to constitute murder, it is, of course, entirely unimportant, for legal purposes, that the actual victim of the accused's act is not the victim destined by him. If A and B are walking together and C fires at A, intending to kill him, but in fact kills B, his (C's) dearest friend, C is none the less guilty of the murder of B.

We may go a step further, and say that, even in cases where the accused did not contemplate, or recklessly disregard, the possibility of homicide following on his act, he may yet be guilty of murder if it does so. If the accused obstructs a person whom he knows to be an officer of justice in the execution of his duty, e.g. by attempting to rescue a prisoner whom the officer is conveying to jail, and death ensues to anybody in consequence, the offence is murder. The same rule is said to apply to any case of attempted felony, in which the accused's act results in homicide, e.g. if a man, intending to inflict grievous bodily harm upon another man, or to commit a rape upon a woman, causes his or her death through fright or injury. Here, though there was no intention to cause death, there is evidence of 'malice aforethought,' which is sufficient to make the offence murder.

By a curious survival of very ancient custom, there cannot be a conviction of murder if the person attacked lives for a year and a day after the commission of the injury which caused his death. At one time, also, there was a tradition that a person could not be prosecuted for the murder of a person whose body could not be found. No doubt it would be very awkward if, after B has been hung for the murder of A, A appeared in public, alive and well. Yet it can hardly be maintained that, at the present day, if there were, for example, clear evidence that B had deliberately set fire to and burned to ashes a cottage in which A was known to be sleeping, B could not be indicted for the murder of A just because A's body had been destroyed by fire.

One of the most serious features of a conviction of murder is, that it must be followed by a sentence of death; the judge having no option or discretion. It is true, of course, that, by the exercise of the royal prerogative of mercy, the capital sentence may be, and in fact is, not infrequently modified; but there are some cases in which public opinion is shocked by the mere pronouncement of the death penalty. A conspicuous example is that in which, in a fit of mental distress, a mother destroys her newly-born infant, without being actually so far insane as to justify a defence on that ground. After being the subject of judicial and other protest for a century, this offence has now been converted into the non-capital offence of INFANTICIDE, if, in the opinion of the jury, the accused had not fully recovered from the effect of the child's birth and by reason thereof the balance of her mind was disturbed. Infanticide is treated as a species of manslaughter, to which we must now turn.

MANSLAUGHTER may be defined as culpable homicide without any of those features which, as we have seen, are held to be evidence (natural or artificial) of 'malice aforethought.' Thus, for example, if by unlawful (but not felonious) conduct, A causes the death of B, having no desire to cause B's death, A has been guilty of manslaughter, not murder, and, *à fortiori*, if, again without any contemplation of the death of B or any one else, A causes B's death by an act which though careless, is not unlawful. Thus, for example, if A leaves deadly poison lying about, and B, a child of three, drinks it and is killed, or if A lets off a firework in a private garden and a person quite unexpectedly entering is killed, these are, at the most, cases of manslaughter. We have seen also that a charge of murder may be reduced to manslaughter by proof of provocation or insult calculated to deprive the accused of control over his actions. When death occurs in the course of a sport or game, and there is no evidence of foul play or irregularity, the homicide is not regarded as wilful, and so is not unlawful; but if the sport itself is unlawful, e.g. prize-fighting, or there is evidence of



foul play (though not with any intention of causing death), a death occurring therein will give rise to a charge of manslaughter. Apparently, no evidence of recklessness on the part of a motorist will be held to justify a charge more serious than that of manslaughter. There is probably no serious crime in which the range of punishment is greater than in the case of manslaughter, varying as it does from penal servitude for life to the mere imposition of a fine.

Another point in which manslaughter differs from murder is the fact that a mere attempt to commit murder is itself a felony punishable by penal servitude for life ; while there can be no attempt to commit manslaughter, which, as we have seen, implies the non-existence of that ' malice aforethought ' which is an essential part of every attempt.

Perhaps the most common of all crimes against bodily security is the offence of ASSAULT, which may vary from a most serious to a trifling and merely technical offence. In the popular view, assault involves actual contact of the body of the prosecutor either directly with the body of the accused, or with an instrument used by him. But this is not the case. The essence of assault is ' putting in fear,' not bodily suffering ; literally, as its name implies, it is a ' leaping at ' (*ad-salire*). Thus, any motion of the accused's body which would lead a reasonably self-controlled person to apprehend an attack, is an assault ; if the attack follows, it is also a BATTERY. By an extension of this idea, FALSE IMPRISONMENT is regarded as an assault, even though no actual violence be used to the body of the prosecutor, e.g. where the accused merely turns the key of a door in the room in which the prosecutor is sitting.

Trivial, or, as they are called, ' common ' assaults, are summarily punishable by proceedings before magistrates, and are usually visited with a fine or short imprisonment, or both, according to the circumstances of the case. Moreover, a common assault has this remarkable legal peculiarity that, though it, normally, gives rise to a civil action as well as a criminal prosecution, yet the magis-



trates before whom the prosecution is tried may, if they please, convict the accused and inflict on him fine or imprisonment, but may at the same time give him a certificate to the effect that they consider the assault to have been justified, or so trifling as not to merit further punishment; and this certificate will, when the sentence has been served, be a complete bar to all further proceedings, civil or criminal, for the same cause. A similar result will follow if the magistrates consider the assault not to have been proved, or so trifling as not to merit punishment, and give a certificate accordingly.

But of course there are many kinds of assaults of a much more serious nature, either because they inflict grievous harm, or because they amount to attempts to commit still more serious crimes. It is not possible to give an exhaustive list of such offences; but they include malicious wounding or other assaults causing actual bodily harm, assaults on peace-officers in the execution of their duty, indecent assaults, garrotting with intent to commit an indictable offence, assaults with intent to commit grievous bodily harm, and with intent, generally, to commit a felony. Some of these assaults are in themselves felonies; some are only misdemeanours. But nearly all of them are indictable offences, and involve heavy punishment, ranging from ten years' penal servitude to one year's imprisonment with hard labour.

Peculiarly atrocious forms of assault are RAPE and kindred offences against women and children. These are not merely anti-social offences of the worst kind, but, being effected by force, fall properly under the head of offences against bodily security. Generally speaking, the consent of the victim is a complete defence to a prosecution for a crime of this kind; for it is of the essence of all forms of assault, that they are against the will of the person alleged to have been assaulted. But in the case of such offences against children too young to understand the nature of the injury intended to be inflicted, the law has long recognized the necessity of ignoring the defence of consent. And now, by the effect of the Criminal Law

Amendment Acts, any carnal connection, accomplished or attempted, between a man and a girl under the age of sixteen, is a misdemeanour in the man, punishable with two years' imprisonment and hard labour, while, if the girl is below thirteen, the completed offence amounts to rape, and is punishable accordingly, i.e. with penal servitude for life. The consent of the girl in any of these cases is immaterial ; but, in the case of a girl over thirteen but under sixteen, where the accused is himself not above twenty-three years of age, a defence that he believed with reasonable cause the girl to be over sixteen will, if believed, be a ground for acquittal on the first occasion of such a charge being made against him, if in fact the girl consented to the act.

There are also difficult cases in which the consent of an adult woman has been obtained by trickery, or the act has been committed while the woman has not been in a condition to resist. Though the earlier cases are not entirely consistent with one another, it seems now to be fairly clear, that if a man has connection with a woman whilst she is unconscious (whether through illness or drunkenness or only sleep), or by personating her husband, or under pretence of performing some other operation, he is guilty of rape, and punishable accordingly.

Closely allied to the crimes which we have just considered is the offence of ABDUCTION, or taking or decoying children from the custody of their parents or lawful guardians. Generally speaking, this definition applies to all cases of children under fourteen, whatever be the ultimate object of the act. It is quite sufficient that the accused enticed the child (or *à fortiori* carried it off) from lawful custody, or harboured it, knowing it to have been so dealt with ; the intent being to deprive the lawful custodian of his possession of the child. In the case of unmarried girls under sixteen, it is a statutory misdemeanour to take them or cause them to be taken out of the guardianship of their parents or lawful custodians ; but here it seems to be necessary to prove an actual knowledge on the part of the accused that the girl was

under lawful care or charge. In the case of unmarried girls under eighteen, where the abduction is for the purposes of prostitution, the offence is a misdemeanour punishable with two years' imprisonment with hard labour ; but the effectiveness of the statute is somewhat marred by the provision, that if the accused can persuade the jury that he or she believed the girl to be of the age of eighteen or over, that will be an answer to the charge.

It will be observed that, in all these cases of abduction, the consent of the person abducted is quite immaterial. The offence is, in form, not committed against her, but against her parents or guardians. But another provision of the Criminal Law Amendment Act, 1885, is aimed at a particularly cruel form of false imprisonment committed against a woman who is detained in a house of ill-fame, or in any place for purposes of prostitution, whether by direct force or by indirect means, such as withholding her clothes. Such an offence is punishable with two years' imprisonment with hard labour. A similar punishment may be inflicted on any one who takes part in sending a child or young person out of the United Kingdom for the purpose of taking part in public performances for profit, except under the license of a police magistrate. It is impossible here to enumerate all the offences against children (many of them, alas ! committed by their parents) which are punished by the law ; but any one who is interested in the subject will find a study of the Children Act, 1908, instructive.

It must not, however, be supposed that bodily security can only be affected by offences which imply an application of force. There may be insidious attacks in which no force at all is used ; and, in some cases, the concurrence of the victim may render the use of force unnecessary to the perpetration of the crime.

Of the former class we may note the very serious offence of attempting the life or health of another by the administration of POISONOUS OR DANGEROUS DRUGS. This is, as we have seen, if the death of the victim follows, no less than murder. But, even if it does not, it is a felony



punishable with ten years' penal servitude ; and if it is done to a woman with the intent to procure abortion, the penalty may be penal servitude for life. In the last case, if the woman knowingly consents to the administration, she also is guilty of the offence ; whilst the performance of any mechanical operation by the use of an instrument or any other means, with a similar object, is an offence similarly punishable, both in the person who performs it and the person who submits.

The only other two offences against bodily security which we can spare space to deal with are the closely connected offences of PIRACY and SLAVE-TRADING. Not only are (or were) they frequently found in conjunction ; but they have this similarity, that they are both offences, not only against English but against International Law. Leaving aside their latter aspect, as being beyond our province, we may deal shortly with them as offences against English Law, punishable in English Courts of Justice.

PIRACY is said to consist of taking a ship on the high seas out of the control of those lawfully entitled to it and carrying away ship or contents in a manner which would have amounted to robbery if done on land. By the English Piracy Act of 1837, any person who, with this object, or immediately after achieving this object, assaults, wounds, or does any other act whereby the life of any person on board such ship may be endangered, will be guilty of a capital felony, and, on conviction, must be sentenced to death. There are various other forms of piracy created by statute, such as hostilities at sea by natural-born or denizen subjects of the King against British subjects in time of war under hostile commission, adherence on the sea during time of war to the King's enemies, boarding merchant-ships and throwing their cargoes overboard, yielding one's ship to pirates, trading with them, or fitting out ships for them. These statutory piracies are felonies punishable with penal servitude for life ; while the minor offence of not resisting a piratical attack when carrying guns or arms is a misdemeanour in the case of the merchant



marine, punishable on conviction with six months' imprisonment.

The various acts which constitute the offence of slave-trading are enumerated in the Slave Trade Act, 1824, and include many indirect, as well as all cases of direct, participation in the traffic in slaves. The punishment for slave-trading is penal servitude for fourteen years, or imprisonment with hard labour for five. It is, however, not quite certain that it can be inflicted by an English Court on any one but a British subject, for an offence committed outside the dominions of the Crown. Where the offence is committed with violence upon the person of the slave or with a view to carry into slavery, it amounts to piratical slave-trading, and is punishable with penal servitude for life.

A complete statement of the law dealing with criminal offences against bodily security would, of course, have to give some account of the almost innumerable provisions of statutes like the Public Health Acts and the Factory and Workshops Acts, the enforcement of which forms so considerable a part of the work of the courts of summary jurisdiction. These rapidly growing parts of the Criminal Law may in time even render it necessary to revise the accepted classifications of English Law, so as to provide for new branches known as Administrative Law and Industrial Law. At present, they are usually treated as sub-divisions of the accepted categories; and an attempt to give any systematic account of them in detail would be quite beyond the scope of a work like the present. It may, however, just be pointed out, that many of the provisions, especially of the Factory and Workshops Acts, may be regarded as precautionary measures against the commission of more serious crimes than those minor offences which they directly prohibit. Thus, for example, a factory-owner who contravenes one of the provisions of the Factory Acts regarding the fencing of machinery, may, if no disaster happens, merely be liable to a fine. But if, through his neglect, death or serious injury follows, he may find himself charged with manslaughter or causing grievous bodily harm.

## CHAPTER XV

### CRIMES AGAINST PROPERTY

FOLLOWING the precedent of the last chapter, we may begin with the more serious crimes directed against property, and deal afterwards with the less serious.

ARSON is one of the very oldest crimes known to English Law ; its frequency probably being caused partly by the inflammable character of early English building materials, and partly by the childish delight in a blaze which is characteristic of primitive peoples. The absence of any system of fire-insurance in those days naturally made the offence extremely serious.

By the Common Law, the offence of arson was defined as the wilful setting fire to a dwelling-house or the curtilage thereof ; but by statute the liability is extended to cover all buildings. It is the first subject dealt with in the Malicious Damage Act of 1861, which prescribes a maximum penalty of penal servitude for life in respect of a large number of buildings specified in sections 1-5, and then goes on to prescribe a maximum of fourteen years for setting fire to any other class of building. All arson is felonious ; but it may be presumed from the requirements of ' unlawfully and maliciously ' specified by the statute, that firing by mere negligence, or in order to avert overwhelming disaster (as in the case of persons engaged in fighting a spreading fire), or with the permission of the owner in order to rebuild, or of one's own buildings without unlawful object, would not constitute arson. Wilful and malicious destruction, by fire or otherwise, of any ship of the Royal Navy, the royal dockyards, arsenals, magazines, rope-yards, victualling offices, or other naval buildings, or any timber or stores therein, or of any military or naval victualling or ammunition stores, is a capital

offence, and must, on conviction thereof under the Dockyards etc., Protection Act, 1772, be visited with a sentence of death. The Explosive Substances Act of 1883 deals with various classes of acts done to the public danger in handling, storing, and exploding explosive substances. The difficulty is, that the Act does not define 'explosive substances' except by saying that they shall be deemed to include materials for making explosive substances, which does not appear to help very much.

BURGLARY (*ham-socn*) is another very ancient crime at the Common Law, now dealt with by the Larceny Act, 1916. It is of a highly technical character, and consists of breaking into another's dwelling-house, or buildings directly communicating therewith, with intent to commit, or of breaking out having committed, a felony therein, between the hours of 9 p.m. and 6 a.m., Greenwich mean time. Burglary is, of course, a felony; and it is punishable with penal servitude for life. House-breaking, a less serious offence, consists of unlawfully breaking into any building, public or private, at any hour, and committing a felony therein, or, having committed a felony therein, breaking out. This also is felony, but is only punishable with a maximum of fourteen years' penal servitude. The mere entering of a dwelling-house at night, or the breaking into it or any other building at any other time, with intent to commit (as distinguished from committing) a felony therein, is likewise a felony, but punishable only with a maximum of seven years' penal servitude.

ROBBERY is, perhaps, as much an attack on bodily security as on property; but it is usually classed with crimes against property. There appears to be no definition of robbery in the Larceny Act, 1916; but its essence is the taking of money or goods from the person of another, or in his presence, against his will, by violence or putting in fear, with intent either to appropriate them, or at least to deprive the person from whom they are taken of them. The essence of robbery is violence; and the extent to which it is punishable varies with the circumstances in which the violence is displayed. Thus, if the robber



is armed, or accompanied by others, or inflicts any personal violence on the person robbed, he will be liable on conviction to penal servitude for life ; if these circumstances are absent, the maximum penalty will be fourteen years. An assault with intent to rob is itself a felony, punishable with five years' penal servitude.

LARCENY, or theft, is, likewise, among the oldest and commonest offences known to the law. The Larceny Act, 1916, defines it as " fraudulently and without claim of right made in good faith taking and carrying away anything capable of being stolen, with intent, at the time of such taking, permanently to deprive the owner thereof." It is worth while calling attention to one or two points in this definition. It is agreed that an honest belief on the part of the taker that the object taken is really his own, or that he has a right to take it, is a defence to a charge of theft. But it must be understood that the mistake under which the alleged thief claimed to be labouring was a mistake of fact, not of law. Thus, if A slips a rope round the neck of an ox which is in B's stall, and leads it away, claiming that it is his (A's), that will be a good defence if A honestly (but mistakenly) believes it to be a beast which he bought in last week's market, or that B had told him he might take it. But if he knew it was B's, but thought that, as B owed him ten pounds, he could take B's ox till it was paid, that would be a mistake of law, and would not help him.

Again, there must be a taking and carrying away (*cepit et asportavit*). Theft at the Common Law was felonious trespass ; and the essence of trespass is that it is an interference with the possession of another person. Thus, by the Common Law, nothing pertaining to the soil, nor, *à fortiori*, the soil itself, could be the subject of theft ; and it required a long series of Acts of Parliament to make such things as vegetables, fruit, fixtures, ore and minerals, capable of being stolen. In former times, too, only things ' of value ' could be stolen ; and by ' value ' was meant physical value. Consequently, things like bank-notes, share-certificates, bills of Exchange, bonds, and the



like, were reckoned only at their parchment or paper value; and a theft of them was only 'petty larceny,' not amounting to felony, until statutes made a change.

Moreover, the common law view of larceny as trespass made it impossible for a person to steal a thing which was in his own possession. Consequently, people like bailees, agents, and the like, who made away with the goods in their hands, could not be convicted of larceny. In the case of servants, the difficulty was got over by the adoption of the doctrine, that the master is still in possession of the goods which he has entrusted to his servant, on the ground that, as the servant is bound to obey his orders, he (the master) still has control over them. Consequently, until the servant showed a clear intention to appropriate the goods, they were in his master's possession; and the act of appropriation was, therefore, trespass. So also with a bailee, such as a carrier. The consignor could be considered to be still in possession till the carrier 'broke bulk,' i.e. did what he knew he ought not to do. In the case of agents, who received goods from third persons for their employers, there was no possibility of applying this theory; and so the new offence of EMBEZZLEMENT had to be invented to meet their case. The fraudulent trustee was a still more difficult person to get at; because he was not merely custodian but lawful possessor of the trust property; and he could hardly steal his own possessions. Still, he is now dealt with by a section of the Larceny Act. It must be carefully remembered, that it is possession, not ownership, which is the foundation of larceny. A man may clearly steal his own horse, if he has let it out on hire to a neighbour for a period which has not yet expired.

The technical definition of larceny as a 'taking and carrying away,' or breach of possession, also gives rise to other difficulties, one or two of which are interesting and practically important.

For instance, suppose a man finds an article apparently abandoned, and picks it up, intending to appropriate it. Has he been guilty of larceny? Of course if it has really been abandoned, he has not: for abandonment means

precisely the relinquishment of possession, and where there is no possession, there can be no larceny. But suppose the article to be a purse containing a substantial sum of money, which has, in fact, been accidentally lost by the person carrying it. If the finder picks it up, intending to keep it for himself, has he committed larceny? The answer is that, unless he can persuade the jury that he honestly believed the article to be abandoned, he has. As the Larceny Act, 1916 puts it: "Where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps." The grammar of the Act is not above criticism; but the meaning is not without common sense. Findings are not keepings, if the finder has reason to believe that the loser would like to have his loss made good. The reasoning is justified by the maxim that "any possession is good against a thief."

Then, again, there is the case of larceny by a trick. Where the possessor of an article has voluntarily parted with possession of it, there can, as a rule, be no theft. But if he were induced to hand it over by an assurance that it is only to be inspected, or tested, or repaired, and then returned, the person to whom it was handed over nevertheless from the first intending to keep it, the latter will not be able to plead his own rascality, and thus escape the charge of theft. At the Common Law, if the intention to keep were not formed till after the article had been received, there could be no larceny, unless the bailee 'broke bulk'; but this was altered by statute in 1857, and now larceny by a bailee, and even by a part-owner, is a recognized offence. But it is quite different from larceny by a trick.

As another instance of the difficulties caused by the legal definition of larceny, we may instance the case of mistake by the prosecutor. Suppose A presents a cheque for £5 to be changed by a banker's cashier. The cashier, being short-sighted or careless, puts down £50 on the counter before A, who picks it up and walks away. In such a case, there could be no doubt that A would be guilty of larceny, because (1) he could not fail to notice the error,

(2) he could not suppose for a moment that it was intentional, (3) he must have intended from the first to appropriate the £45 excess. The last fact is the clue to the law. If a person to whom anything has been delivered by mistake (as he must know), then decides to keep it, he is a thief. But the mere fact that he retains it, even after he has discovered the error, is not enough to convict him, if he can persuade the jury that he was willing to return it on demand. He is not bound to seek out the person who made the error. *A fortiori*, if he spends the money without realizing the error, he is no thief. Such a thing may easily happen with a hawker or pedlar, who is continually effecting small sales and purchases.

We come now to the last ingredient in the definition of larceny, "with intent . . . permanently to deprive the owner thereof." There has been a radical, and, apparently, unperceived change in this element during the last century, not, it is suggested, for the better.

The ingredient originally, doubtless, was inserted in the definition to avoid the cases in which a person, moved by the spirit of mischief or carelessness, rather than of gain, removes from the possession of its owner an article for temporary use. The casual clubman who 'borrows' an umbrella which he knows not to be his from the clubstand, the youth who cannot resist the temptation of a secret joy-ride on his neighbour's motor-cycle, is guilty of reprehensible conduct; but he hardly deserves to be branded as a thief. Accordingly, most civilized legal systems require that, for such a condemnation, there must be what the Roman Law calls *animus lucrandi*. The old English writers on the Common Law, such as Sir Matthew Hale and Sir William Blackstone, are evidently puzzled to know how to define this ingredient, and generally ride round it by using some such expression as *animus furandi* or 'felonious taking,' which helps little. But from the numerous cases cited by them, it is clear that the gist of the offence was, till lately, the intention of the taker to keep the thing for himself, i.e. to make a pecuniary profit of his taking (for nothing without value is capable of being



stolen). Unfortunately, about the middle of the last century, in a famous trial for larceny of a man who took skins from one part of his master's warehouse to another, in order to be able to claim that he had done work on them, the accused was acquitted by the Court of Exchequer Chamber, on the ground that he did not intend to deprive the owner permanently of his property. The decision was manifestly right; but the reason given for it was unfortunate, and, more unfortunately still, it began to creep into subsequent judgments, till it became classical. Thus, if a man sets another man's motor car going on the edge of a cliff, with the deliberate intention of causing it to be smashed to atoms on the rocks below, and succeeds, he can apparently, be convicted of larceny under the Act of 1916. Doubtless he has been guilty of a criminal act, namely of malicious damage to property; but he has not been guilty of larceny in the historic sense of the word. The true essence of larceny is the intention to convert to one's own use the goods of another; and, as late as the year 1858, on the direction of Baron Martin, a prisoner was acquitted of the charge of stealing Government papers, because he did not intend to convert them to his own use.

All kinds of circumstances may affect the gravity, and therefore, the punishment, of larceny. Thus, though all larcenies are felonies, simple larceny (i.e. larceny not accompanied by any circumstances considered as aggravating the offence) cannot be punished with more than five years' penal servitude, unless the offender is a male under the age of sixteen, who may be ordered to be whipped. But stealing of cattle, stealing from the person, stealing in ships or docks, stealing by servants from their employers, may be visited with fourteen years' penal servitude; and stealing of testamentary documents and articles in course of transit by post are offences for which a sentence of penal servitude for life may be imposed. At the Common Law, dogs, as animals *ferae naturae*, in which no property could exist, were not legally capable of being stolen. By the Larceny Act, theft of a dog is not a felony; but, on a second conviction, it is a misdemeanour punishable with



imprisonment for eighteen months, with or without hard labour.

A degree below theft or larceny, but closely allied with it, is the offence of OBTAINING MONEY (including securities) OR GOODS BY FALSE PRETENCES. The essential difference between this offence and larceny is, that the prosecutor is induced voluntarily to part with the ownership as well as the possession of his goods, and, therefore, there has been no trespass by the accused. In order to convict on this charge, it must be shown that the accused deliberately made a false statement as to an existing fact, knowing the same to be untrue, and that the prosecutor parted with his goods on the faith of such statement. No mere statement of opinion or prediction, such as that "the shares are absolutely bound to rise in value," will suffice. Nor must this offence be confused with that of extorting money by the use of threats, commonly known as 'blackmail.' Though that offence is also dealt with by the Larceny Act, it more properly belongs to another class of crimes, and will so be dealt with in this book. But the RECEIVING OF STOLEN GOODS, knowing them to have been stolen, is certainly an offence cognate to theft. And it should be noted that it covers the receipt of goods which have not, strictly speaking, been stolen, but which have, nevertheless, been obtained by criminal means, e.g. false pretences, or fraudulent conversion, but that the nature of the original offence will determine the degree of the subsequent felony or misdemeanour. Thus, knowing receipt of stolen goods is felony, because larceny is felony; but similar receipt of money or goods obtained by false pretences is misdemeanour, as is also the offence of obtaining money or goods by false pretences. Oddly enough, though this last offence itself cannot be visited with more than five years' penal servitude, the knowing receipt of goods obtained by false pretences may involve a sentence of seven years.

Considerations of space compel us to omit all attempt to deal in detail with the two serious offences against property known as MALICIOUS INJURIES and FALSE COINING. Both of these are rather classes of offences than single offences,

and are treated by the law with a minuteness which is an eloquent testimony to the difficulty experienced in stamping them out. The chief difference between them is, in substance, that malicious injuries are prompted by revenge and mischief, while coinage offences are mainly done *animo lucrandi*, and are thus closely allied with theft. Coinage offences range in seriousness from actual counterfeiting of current coin of the realm, which is felony, and may be visited with penal servitude for life, down to the uttering or passing of base coin, or possessing with intent to utter it, which is only a misdemeanour (at any rate on the first conviction) punishable with one year's imprisonment with hard labour. Malicious injuries to property range from wilful setting fire to ships, dockyards, arsenals, or stores of the Royal Navy, which, as previously noticed, is a capital offence, down to the misdemeanour of defacing public monuments, museums, and works of art, punishable with six months' imprisonment with hard labour. A general clause of the Malicious Damage Act, 1861, imposes a penalty of two years' imprisonment with hard labour on any malicious spoliation not otherwise provided for, if committed in the daytime. If it is committed between 9 p.m. and 6 a.m., the maximum penalty is five years' penal servitude.

We come now to the last of the offences against property with which it is possible to deal, namely, the offence of FORGERY, the law as to which will be found mainly in the Forgery Act of 1913.

By the terms of that Act, forgery is defined as the making of a false document in order that it may be used as genuine. It will be observed, therefore, that forgery, *per se*, does not involve 'uttering' or making use of the forged document; and, as a matter of fact, the mere making, with intent to defraud, of certain false documents, such as testamentary papers, deeds, bonds, bank or currency notes or any other valuable securities, documents of title to land or goods, powers of attorney to deal with stock and shares, entries in Registers of Title, policies of insurance, charter-parties, and some official documents

such as certificates of various kinds—is a felony punishable with fourteen years' penal servitude. Forgery, with intent to defraud or deceive, of any document bearing one of the Royal Seals of office, or of the Royal Seals themselves, involves liability to penal servitude for life ; while forgery with a similar intent of many other official documents entails a liability up to fourteen years. In cases not specifically made felonies, forgery is a misdemeanour, punishable with imprisonment with hard labour for two years.

But, just as there can be forgery without uttering, so there can be uttering without forgery. For if any person, with intent to defraud or deceive, puts forward in any way any seal, die, or document known by him to be forged, he is deemed to have committed the same offence, and is liable to the same penalty, as the person who actually committed the forgery. Even the mere possession of forged bank-notes, dies, implements and materials for forgery, without lawful authority or excuse, the proof whereof lies on him, amounts to felony, and involves liability to penal servitude for periods varying from fourteen to seven years, according to the nature of the forged documents or instruments of forgery.

There appears to be no definition of 'making' in the Act ; but a glance at the sections which attempt to define 'false documents' shows at once that the popular idea that forgery can only be effected by signing another person's name, is quite baseless. It is said, and probably with truth, that a person may commit forgery by signing his own name, e.g. if one James Brown signs a cheque and sends it to a person who, he knows, will think it comes from another James Brown. It is quite certain that a man may commit a forgery by signing a fictitious name, or the name of a deceased person ; and that, on the other hand, he need not sign his name at all in order to be guilty of forgery. For any material alteration in a professedly complete document makes it a false document ; and the person who makes that alteration with the intention that the altered document shall be used as genuine,

is guilty of forgery. And a false document means, for the purposes of the Act, a document, the whole or a material part thereof purports to be made by or on behalf or on account of a person who did not make it or authorize its making. And it does not matter, in order that a forgery may be proved, that the forged document should be incomplete or not purporting to be binding or sufficient in law. Thus a cheque may be a false document, and its drawer be convicted of forgery, even though an expert, glancing at the cheque, would see at once that, even if genuine, it could never serve its apparent purpose.



## CHAPTER XVI

### CRIMES AGAINST RELIGION AND MORALITY

SINCE the introduction of toleration for Protestant Dissenters in 1689, and the gradual removal of Roman Catholic disabilities in the late eighteenth and early nineteenth centuries, attacks on religious beliefs have not frequently been the subject of criminal prosecution. Nevertheless, as there was a conviction for the offence of Blasphemous Libel as late as the year 1921, and as the attitude of the Courts towards what is commonly called 'secularism' was elaborately discussed by the House of Lords, sitting in its judicial capacity, as late as 1917, it is necessary to say a few words concerning attacks on religious belief as distinguished from conduct.

The offence most commonly alleged in this connection is that known as BLASPHEMY, or, if effected by written or printed words, BLASPHEMOUS LIBEL. This is said to consist of speaking or publishing words attacking the essential truths of the Christian religion, in a manner calculated to wound the feelings of its professors, and (in the case of blasphemous libel) to provoke a breach of the peace. As the late Mr. Justice Stephen pointed out, in his valuable *History of the Criminal Law of England*, this is, undoubtedly, a modern version of the original view of blasphemy, which made its way into the ordinary Courts after the Restoration, and was actively enforced till the beginning of the nineteenth century. During that period, it was the fact of calling in question the doctrines of Christianity, and not the manner of criticizing them, that was the gist of the offence. Since the liberalizing spirit of the nineteenth century took effect, however, it has become manifestly impossible for the

Courts, in the absence of statute, to hold that a temperate and rational criticism of the dogmas of Christianity is a criminal offence. Had they done so, half the most eminent thinkers and writers in the country would have stood in danger of fine and imprisonment. And so the Courts gradually modified their attitude; and to-day it is unquestionably the manner, rather than the matter of such attacks that is the gist of the offence. In the case of *Gott*, decided in 1921, the language, both of the trial judge in directing the jury, and of the members of the Court of Criminal Appeal, makes this quite clear. As the trial judge, alluding to the accused's writings, put it: "Is this anything more than vilification, ridicule, or irreverence of the Christian religion and of the Scriptures? Is it in any sense argument?" On the other hand, the House of Lords had held in 1917, that a society avowedly formed for the purpose of discouraging all beliefs in supernatural authority or power was entitled, as a society with a lawful object, to take under a charitable bequest. Blasphemy and blasphemous libel are misdemeanours punishable with fine and imprisonment.

Certain old Acts of Parliament, not formally repealed but never enforced, treat as misdemeanours open attacks on, or 'depraving' of, certain sacraments, ordinances, and formularies of the Established Church; and certain more modern statutes, occasionally enforced impose substantial fines on persons disturbing, or behaving indecently at, lawful meetings for religious worship. One of the latest, if not the last, is the Burials Act of 1880, which makes it a misdemeanour to be guilty of any riotous, violent, or indecent behaviour at one of the burials authorized by the Act.

PERJURY is an offence closely allied to religion, since it had its origin in the horror with which people regarded the man who, after a solemn appeal to the Deity to witness to the truth of his words, deliberately forswore himself. Perjury at the present day consists of the giving of false evidence, which is material to the issue, in a judicial proceeding, knowing it to be false, or not believing it to

be true, after going through the ceremony of taking the oath, or making a solemn affirmation. Probably owing to the fact that it was for long dealt with only by the ecclesiastical courts, perjury has never been recognized as a felony, though it is punishable with seven years' penal servitude, or two years' imprisonment with hard labour and a fine. It has previously been pointed out, that perjury is one of the very few offences of which a conviction cannot be had solely on the evidence of one witness.

There are various other forms of false swearing or false statement in legal matters, such as the celebration of marriages, registration of births and deaths, statutory declarations, and professional registers, which are punishable under the Perjury Act, 1911. 'Subornation of perjury' is an attempt to procure a person to commit any of the offences punishable under the Act, and is itself an indictable misdemeanour, punishable with fine and imprisonment.

We turn now from offences against creeds to offences against the moral code of conduct.

One of the most important of these is BIGAMY, or the offence of going through the ceremony of marriage while under the tie of an existing legal marriage. We have previously seen that, whereas knowledge of the existing marriage is not part of the statutory definition of the offence, yet a reasonable and *bonâ fide* belief in the death of the spouse is a good defence to a charge of bigamy, as is also, by the express words of the Act, the absence of the spouse from the knowledge of the accused for seven years previous to the bigamous 'marriage.' It was long one of the curiosities of the Law of Evidence that, while the real wife or husband of the accused in a case of bigamy was neither competent nor compellable to give evidence against him or her, the second 'wife' or 'husband' was. But, by a recent alteration in the law, the real wife or husband of the accused is now competent, though not compellable, to do so. Bigamy is a felony, punishable with seven years' penal servitude; and a party to the offence who knew that the other was committing bigamy,



will be liable as principal in the second degree, even though he or she were not married at the time.

Morally more heinous, even than bigamy, is the offence of INCEST, or the holding of conjugal intercourse with a blood relative within the second degree, legitimate or illegitimate ; the accused being aware of the relationship. Of course, in the case of a female, forced connexion would not make her guilty of incest ; but also no female below the age of sixteen can be prosecuted for incest. The offence is a misdemeanour, punishable with seven years' penal servitude.

It is necessary to refer to, but not necessary to dwell upon, those revolting crimes against morality known as UNNATURAL OFFENCES, which, by the Offences against the Person Act, 1861, are felonies, punishable with penal servitude for life. The mere attempt to commit such a crime, or assault with intent to commit it, will be a misdemeanour punishable with ten years' penal servitude.

Apart from these specific offences, mere sexual immorality is not *per se* treated as an offence by the Criminal Law. Even adultery, though technically punishable in the ecclesiastical Courts, is treated in the civil merely as a ground for divorce or judicial separation, not as a criminal offence. Similarly also with such offences as drunkenness, indecency, gambling. These are, undoubtedly, regarded by English Law as *mala in se* ; but they are not, in themselves, the subject of criminal prosecution, with the exception of the case in which a male person, whether in private or in public, commits or attempts to commit an act of gross indecency with another male person, which is a misdemeanour punishable with two years' imprisonment with hard labour. But in many other cases, the addition of some circumstance, such as publicity, exploitation, or repetition, will convert what is, in itself, only a moral offence, into a crime. Thus, for example, though fornication is not in itself a criminal offence, a prostitute who solicits custom in a public place, a person who keeps a house technically known as a ' disorderly house,' for the purpose of encouraging gambling,



betting, or prostitution, a person who procures or attempts to procure a woman under twenty-one, not being already a common prostitute or of known immoral character, to engage in fornication, are, severally, guilty of misdemeanours entailing punishment of various degrees of severity up to two years' imprisonment. Thus, also, a person who frequents or loiters in public streets for the purposes of bookmaking or betting, is liable to summary conviction and fine on the first and second occasions, and on a third or subsequent to conviction (on indictment), to a fine or imprisonment for six months, under the Street Betting Act, 1906.

CORRUPTION OR BRIBERY is an offence which has been prevalent for many centuries, but was for long looked upon as venial, if not harmless. The matter has, however, received considerable attention from the legislature in recent years. Reference may be made especially to the Corrupt Practices Act of 1883, dealing with Parliamentary elections, the Municipal Elections Act of 1884, dealing, as its name implies, with municipal contests, the Public Bodies (Corrupt Practices) Act, 1889, dealing with official corruption, and the Prevention of Corruption Act, 1906, dealing with corruption or bribery of agents by secret commissions. The essence of all these offences is, that the offender is allowing pecuniary motives to influence his conduct in a manner contrary to that imposed by his duty.

Finally, there is the very comprehensive offence of NUISANCE, or, more properly, Public (or Common) Nuisance, under which head a large number of minor offences against social morality are included. The essence of it is an obstruction, inconvenience, or damage to the public in the exercise of rights common to all members of the community. An enumeration of the more familiar examples will explain its character. They include (1) the obstruction of highways (including navigable rivers), (2) the non-repair of highways by those under a duty to repair them, (3) the pollution of public waters, (4) the allowing of buildings to become a source of danger

to the neighbourhood, (5) the emission of loud and distracting sounds or poisonous fumes, (6) the storing of explosives on unlicensed premises, (7) the exposing of persons known to be suffering from contagious disease to contact with the public, (8) the exposing for sale adulterated or unwholesome food, (9) the keeping of an unlicensed tavern or other place of entertainment by law requiring a license. One of the most interesting, but least appreciated cases of nuisance is that of the enterprising entertainment provider or shopkeeper, who, by the attractiveness of his entertainment or his shop-windows, causes crowds to assemble in the street, so that the members of the public who wish to use the pavement for its legitimate purpose of a passage way cannot do so, and persons whose houses are obstructed by the crowd cannot reach them. It looks as though, in some parts of London, the police authorities were hardly alive to their duties in connection with this form of nuisance.

All public nuisances are misdemeanours, punishable with fine and imprisonment. Usually they are indictable offences; but some statutory nuisances are summarily punishable.

## CHAPTER XVII

### CRIMES AGAINST THE REPUTATION

THIS is a limited but important class of offences, which includes Libel, Extortion by threats of exposure ('black-mail'), and Malicious Prosecution.

LIBEL, i.e. defamation by written words or pictures, is both a criminal and a civil offence; but there are considerable differences between the two, which will appear in due course. Spoken words, unless they are blasphemous or seditious, cannot be made the basis of a criminal prosecution; though they may constitute the civil offence of Slander. In the days before the invention of printing, libel had a comparatively limited effect; but with the arrival of that art, it at once sprang up as a real danger, and was promptly tackled by the Court of Star Chamber, from which much of the modern law of criminal libel is derived.

It is important to note, that defamation consists in lowering a person, not in his own esteem, but in the esteem of his neighbours. Therefore, no amount of insult, however cutting, can be libellous, unless it includes some statement which is calculated to bring the prosecutor into hatred, ridicule, or contempt. On the other hand, publication, or making known the statement to a third party, is not essential in a criminal libel. It is sufficient if the libel is communicated to the prosecutor, and is calculated to lead to a breach of the peace.

It is of the essence of libel (as of all defamation) that it should contain an 'innuendo,' i.e. an assertion or implication calculated to bring the person libelled into hatred, ridicule, or contempt. This may be very subtly disguised; and the success of the prosecution may depend upon the prosecuting counsel being able to convince the jury that such an innuendo exists. Until the passing of Fox's famous Libel Act of 1792, the whole question of

innuendo was for the Court ; the jury being left to find simply the fact of publication. That Act gave them power to return a general verdict of ' Guilty ' or ' Not Guilty ' ; but the Court is still entitled to rule that the writings complained of cannot possibly be held defamatory.

There is an interesting point on the subject of *mens rea* and libel. By long tradition, every indictment and action for libel alleged that the accused ' maliciously ' published of and concerning the prosecutor (or plaintiff), etc. But it was long ago decided, that the only evidence of malice necessary to constitute the offence was the defamation itself. A person who publishes a defamatory statement, by that very fact, shows himself to be ' malicious,' unless he can justify himself by one of the recognized excuses or privileges which the law allows. In an action of defamation decided more than a century ago, and usually recognized as settling the point, the Court of King's Bench laid it down that malice " in its legal sense, means a wrongful act, done intentionally, without just cause or excuse." And, at the beginning of the present century, the House of Lords held, in a still more famous case, that the proprietors of a newspaper could be made liable for libelling a man of whose existence they professed to be entirely ignorant, on the ground that from their description the plaintiff could be (and, in fact, had been) identified as the subject of the defamation. To put it in another way, a man who publishes a defamatory statement does so at his own risk.

What are the " just causes or excuses " which relieve the publisher of a libel from legal consequences ? It might be supposed that a defamatory statement could be justified on the ground of its truth. That is, in fact, the law, so far as civil actions are concerned ; though, of course, even in such cases, ' true ' means, not merely verbally true, but true in substance and in fact. Thus, for example, if A wrote of B : " B is *now*, I believe, quite a sober man," this might be literally true ; but, as it would imply that B had at one time been intemperate, it might very well be defamatory.



And truth is no defence to a criminal libel, unless it is also to the public benefit that the matters stated in the libel should be published. For the Criminal Law is not so much concerned with the harm to the prosecutor as with the danger to the community ; and it considers that a wanton and purposeless, or merely spiteful, publication of an unpleasant truth, when manifestly likely to provoke a breach of the peace, is not justified. In a criminal prosecution, moreover, the prosecutor is not seeking to make money out of his previous lapse from virtue.

A second defence to a prosecution for libel is that of ' fair criticism.' It is applicable only where the prosecutor is a person who, by the nature of his position or occupation, submits his conduct to public criticism ; such as a politician, an author, a painter who exhibits his work, an actor, a leader of public movements, and the like. In so far as criticism consists merely of statements of opinion, it can hardly be defamatory, though it may, undoubtedly, seriously diminish the reputation of the prosecutor. Thus, for example, if a well-known and esteemed critic, reviewing a play, should write : " This is a thoroughly bad play," he would obviously be expressing merely his own opinion ; and, however disastrous his opinion for the playwright, the critic would not have gone beyond his rights. But if the criticism contains also statements of fact, express or implied, which are both untrue and defamatory, it would seem that ' fair criticism ' is not a defence. Suppose, for example, that A, in reviewing B's book, wrote : " An author who confuses Oliver Cromwell with Thomas Cromwell is hardly to be trusted in matters of history," and suppose that B's book contained no passage which could possibly convey such an impression, then, probably, the defence of ' fair criticism ' would not be upheld.

A third interesting defence to a prosecution for libel is that known as ' privilege.' Where, in performance of a legal or merely moral duty, a man publishes a defamatory statement about another, honestly believing it to be true and material to the performance of his duty, he cannot be either convicted and punished, or ordered to pay

damages for libel in a civil action, even if, in fact, the statement turns out to be untrue. The defence usually arises in cases of characters given to employees by their present or former employers. Thus, if A is thinking of engaging B as a confidential secretary, and writes to X, B's former employer, for B's character, and X replies: "B is a very decent fellow, but he cannot keep secrets," this is, in the circumstances, defamatory of B. But no Court would allow X to be convicted or cast in damages, unless the prosecutor or plaintiff could prove, not only that the statement was untrue, but that X either did not reasonably believe it to be true, or was actuated by some improper motive in making it.

Many other publications enjoy a similar privilege, absolute or qualified. Thus no proceedings for libel will succeed against a person who, as a judge, counsel, witness, or party in a judicial proceeding before a Court of competent jurisdiction, publishes defamatory matter, or one who does so in the course of military duty, or one who publishes reports and other papers deemed by either House of Parliament fit or necessary to be published, but which are defamatory, or, in the case of newspaper reports, publishes fair and accurate contemporary accounts of judicial proceedings, which contain defamatory statements; even though such statements should, in fact, turn out to be untrue, and untrue to the knowledge of the accused. In other cases, the defence of privilege will break down if the prosecutor shows, or (in some cases) fails to disprove, the existence of 'express malice'—i.e. some motive of revenge, or spite, or desire to injure the prosecutor, which is inconsistent with the unbiassed discharge of duty. Such privileges are said to be 'qualified.'

The position of the public Press is, obviously, so bound up with the Law of Libel, that though, for the most part, newspaper proprietors, editors, and contributors are subject to the same rules in respect to the Law of Libel as other persons, yet there are one or two points of difference which are important. Perhaps the most

important is that which, contrary to the general rule, prevents a prosecution for libel in a newspaper being commenced against the proprietor, publisher, editor, or any person responsible for the publication of the newspaper, without the order of a Judge in Chambers. This very exceptional privilege is, doubtless, due to the fact, that it is almost impossible for the controllers of a large newspaper to satisfy themselves personally of the truth or harmlessness of every item of news published in it, before it appears. On the other hand, a newspaper which refuses to publish a reasonable contradiction or explanation of a report or other publication which has appeared in it, cannot take advantage of its qualified privilege, referred to above, in the matter of reports of public meetings. Moreover, although, as has been previously explained, there is no censorship of the Press in England, yet every printed publication must, under penalties, bear the name and address of its printer; while the printer of every newspaper must keep at least one copy of every issue with the name and address of the person who employed him to print it legibly written or printed thereon, in order that any person who wishes to take proceedings for libel in respect of any article published therein, may be able to know whom to sue. Technically, of course, any person, however innocent, who takes any part whatever in the circulation of a libel, is liable to criminal and civil proceedings therefor; but it is not usual to proceed criminally against mere distributors in the ordinary way of business who have no knowledge or suspicion of the existence of the libel.

Finally, though the Act is not directly connected with the Law of Libel, it may be interesting to refer to the recent statute of 1926 which greatly restricts the former right of newspaper proprietors to publish evidence given in Courts of Justice of an indecent character, and still more, of all but the barest outlines of matrimonial cases. The Act, however, can only be used in proceedings against proprietors, editors, master printers, and publishers; and no proceedings can be commenced under it without the



sanction of the Attorney General. The penalty for disobedience to the Act is imprisonment up to four months, or a fine up to £500, or both.

Libel is a misdemeanour at the Common Law, punishable with fine and imprisonment, which latter is, by the Libel Act of 1843, limited to two years in cases in which the accused knew the libel to be false, and one year in other cases.

The cruel and cowardly offence known as BLACKMAILING, or the extortion of money or valuables by threats, is by some writers treated as an offence against property. This seems to be a mistake, as tending to divert attention from the real nature of the offence. Where the threats in question are of physical violence, there is not much distinction between this offence and robbery, except that the valuables obtained are not always on the person or in the immediate presence of the victim. But the essence of blackmail is that by the exercise of mental, rather than physical terrorism, it compels the victim, for fear of losing his position in society, to comply with the most outrageous demands of the blackmailer. Even where the accusation is well-founded, the offence is bad enough; where it is purely imaginary, as in many cases, the crime is one of the most horrible in the calendar, and especially because only an exceptionally strong-minded person will face the torture and ignominy of initiating a prosecution for it. It is for this reason that Judges are in the habit of allowing the names of prosecutors to be suppressed in such cases.

Precisely then, the offence is committed by accusing or threatening to accuse of any crime involving capital punishment or penal servitude for seven years, or of assault with attempt to commit a rape, or of an attempt to persuade any one to commit an unnatural offence, in order to extort property from the person threatened, or by 'uttering,' knowing the contents thereof, any letter or writing making such an accusation, with a similar intent. It should be observed, that the threat need not be to accuse the person to whom it is addressed, or even any living person. Only too frequently a man is blackmailed, not



to save his own reputation, but that of a relative, living or deceased ; blackmail therein differing from the offence of libel, which cannot (it would seem) be committed by defaming a dead person. The offence of blackmail is a felony, punishable with penal servitude for life, with, in addition, in the case of a male under sixteen, one private whipping.

MALICIOUS PROSECUTION, though now treated almost invariably as a mere civil offence, giving rise to an action for damages, is still, in strictness, also a criminal offence ; it being dealt with in certain old but unrepealed statutes under various forms. The oldest is Conspiracy to procure false indictments for treason or felony, which is treated of in statutes of 1300 and 1305, and, for some time, was the subject of prosecutions. The great objection to it was, however, that it could not be proved against a single accused ; conspiracy necessarily involving at least two persons. Again, it did not apply to indictments for misdemeanours. Accordingly, from the end of the fifteenth century, it was superseded by the action on the Case for Malicious Prosecution, of which we shall say something in a later chapter.

MAINTENANCE is another form of malicious prosecution which is dealt with by old statutes. It consists of taking part in litigation in which the person interfering has no legitimate interest. Probably with good reason, the Courts of the Middle Ages had a deep suspicion of persons who meddled with the lawsuits of others ; so much so, indeed, that a witness who volunteered evidence without being summoned to give it, ran a serious risk of being indicted as a common ‘ barrator ’ or stirrer-up of strife. CHAMPERTY is a particularly dangerous form of Maintenance, which has the special feature that the champertor bargains, as the price of his assistance, for a share in the spoils of victory. Maintenance, champerty, and barratry are all misdemeanours at the Common Law ; but, as in the case of conspiracy, they have now ceased to be treated as crimes ; being visited by civil actions for damages by the person against whom the litigation was directed.

## CHAPTER XVIII

### SANCTIONS OF THE CRIMINAL LAW

WE have had reason, during the last four chapters, to refer constantly to various punishments awarded in respect of various offences. It now becomes advisable, in concluding our review of the Criminal Law, to explain briefly the nature of these various punishments, as well as of certain other processes recently introduced, not so much as deterrents, as with the object of reforming or improving the persons to whom they are applied. We will begin with punishments properly so called.

1. *Death*.—Capital punishment, once the common penalty for all serious crimes, is now, as we have seen, restricted to four cases, viz. high treason, murder, piracy with violence, and arson of naval storeyards, ships, dock-yards, etc. It is invariably executed by hanging, or, rather by dislocation; though, strictly speaking, it is open to the Crown to demand the ancient method of decapitation in the case of execution for high treason. Capital punishment, after being a popular spectacle for centuries, was made private in 1868, so far as regards the punishment of murder. This rule does not apply to other cases; but Casement, who was executed after conviction of high treason in 1916, was executed within the prison walls. The execution is followed within twenty-four hours by a coroner's inquest on the body, which is buried within the prison precincts. The news of the execution is indicated to the public by the posting outside the prison walls of copies of the surgeon's certificate of death, the sheriff's declaration of due execution of the sentence, and the verdict of the coroner's jury.

2. *Penal servitude*, which was substituted for transportation in 1853, when the overseas dependencies of the Crown

finally refused to receive convicts, is the punishment reserved for all the more serious crimes, other than the four capital crimes. It can only be awarded after a trial by a petty jury on indictment by a grand jury, and committal for trial by the magistrates. After some considerable hesitation, the minimum period for which it may be imposed has now been fixed at three years ; it may, as we have seen, frequently be imposed for life. But where penal servitude is prescribed by an Act of Parliament, the Court may, in its discretion, unless the Act expressly provides to the contrary, award instead imprisonment up to two years, with or without hard labour.

Penal servitude commences with a short period of solitary confinement, which is followed by hard, but not severe work in agriculture, quarrying, and other outdoor pursuits.

It was a feature of the original scheme of penal servitude, set up in 1853, that convicts should, by good behaviour, be able to earn a remission of part of their sentences, and should obtain a revocable liberty by means of a license or ticket-of-leave. This feature was probably taken over from the old Regulations for transported convicts, and has, ever since, played an important part in the penal servitude system. The conditions under which licenses may be granted and revoked were laid down in the Penal Servitude Act of 1864 ; and the form is carefully prescribed by the Act. If a convict on license fails to observe any of the conditions on which his license is granted, he incurs a fresh penalty of three months' imprisonment. But if he is guilty, during his liberty, of any offence recognized by the ordinary Criminal Law, his license is revoked ; and, in addition to undergoing the punishment for his new offence, he will afterwards be put to serve the remainder of his original sentence. Penal servitude may not be imposed on a person below the age of sixteen.

3. *Imprisonment*—i.e. detention within a building of limited size without open-air occupation. It is now recognized that this is, time for time, a severer punishment than penal servitude ; especially when it is accompanied



by hard labour. Accordingly, in substance, it is never awarded for longer than two years for a single offence ; though, when there has been a conviction on a peculiarly bad course of conduct, consecutive sentences of two years for different items may be awarded, even when the first has included the addition of hard labour. But the powers of Courts of summary jurisdiction in this respect are limited.

Imprisonment with hard labour is a purely statutory punishment, and is rarely allowed to exceed two years.

4. *Whipping*.—It may perhaps come as somewhat of a surprise to a layman to learn that, despite the immense strides taken in the mitigation of the severity of the Criminal Law during the last hundred years, the punishment of whipping may still legally be inflicted in a good many cases. Whipping of females by State officials was finally abolished in 1820, and what may be called “common-law whipping” i.e. whipping inflicted otherwise than under the provisions of a particular statute, in 1914. Moreover, when a whipping is ordered for a crime of violence under the Offences against the Person Act of 1861 or the Larceny Act of 1916, the number of strokes to be inflicted, and the instrument to be used, must be specified in the sentence of the Court. The number of strokes may not exceed twenty-five (to be inflicted with a birch rod) in the case of boys under sixteen, and, in the case of other males, fifty. Where whipping is inflicted by magistrates, the same particulars must be specified ; but here the number of strokes with a birch rod to be inflicted on a boy under fourteen must not exceed twelve. No one may be whipped more than once for the same offence ; and the indecent spectacle of public whipping has long since been abolished.

5. *Fine*.—Pecuniary penalties are among the oldest sanctions of the Criminal Law ; and, by the Common Law, there was no limit to their amount. Certain vague general restrictions on excessive fines were imposed by Magna Carta and the Bill of Rights ; but far more effectual in preventing abuses have been the statutory limitations



imposed in the case of particular offences in recent years. When a fine has been imposed after a prosecution by indictment, the convicted person may be imprisoned for non-payment. But severe restrictions were imposed by the Criminal Justice Administration Act of 1914 on the power of magistrates to commit to prison for non-payment of fines imposed by courts of summary jurisdiction; time for payment being allowed in most cases, with a provision for reduction of the period of imprisonment on part payment, and another for recovery of the money by other steps. Moreover, the Court, in fixing the amount of the fine, is to take into account the apparent means of the offender. Of course, quite apart from imprisonment, a fine is a debt due to the Crown, and, as such, takes priority of ordinary debts, and can be recovered by steps not open to the private creditor.

6. *Recognizances*.—Closely allied to fines, but directed towards prevention rather than punishment, is a very ancient and salutary process of ordering an accused person to enter into recognizances, i.e. admissions of liability to the Crown, either with or without sureties. These recognizances are in the nature of bonds, by which the accused is 'bound over,' either to re-appear in court to take his trial ('bail'), or for good behaviour generally, or merely to keep the peace. In the event of the person 'bound over' failing in any of his undertakings, his recognizances are 'forfeited' or 'estreated,' i.e. ordered to be enforced, to recover the amounts in respect of which the accused or his sureties admitted themselves to be bound to the Crown. These likewise are Crown debts, preferentially recoverable.

7. *Police supervision*.—This is a more modern form of prevention than entering into recognizances. It dates from 1871, and may be applied whenever, on a trial for an indictable offence, the accused is shown to have been previously convicted of any crime. He may then be sentenced to be, on the completion of his sentence for the later crime, 'under police supervision' for a period not exceeding seven years. During this period he must

notify, by personal appearance, the local police authorities of his address, and keep them informed of all changes of address, reporting himself once a month to the chief police official of the district. Moreover, even if no sentence of police supervision is passed, a person who has been convicted of an indictable offence after a previous conviction for any crime, commits an offence against the Prevention of Crimes Act, and incurs liability to a sentence of imprisonment, with or without hard labour, for a year, if he conducts himself in a suspicious manner in various ways.

8. *Preventive detention*.—A still more drastic form of supervision was created by the Prevention of Crimes Act of 1908, which provided that, wherever a person is convicted of any felony or one of the more serious misdemeanours, and, on his own confession or the verdict of the jury, is an ‘habitual criminal,’ i.e. has at least three times previously been convicted of a similar crime, and is leading persistently a dishonest or criminal life, the Court before which the latest conviction occurs, having sentenced him to penal servitude, may sentence him to a minimum of five and a maximum of ten years’ preventive detention, to commence with the expiry of the sentence of penal servitude. Preventive detention is served within prison walls; and the prisoner is subject to the law as though he were undergoing penal servitude. Nevertheless, it is the policy of the Act gradually to mitigate the rigour of the discipline applied to him, and, by employing him in such work as may be best fitted to enable him to earn an honest livelihood on his discharge, to prepare him gradually to return to civil life. Every three years the detained person’s case is reviewed by the Secretary of State, to determine whether he may be allowed out on license, or on probation, in manner to be later explained.

Finally, it was determined in a recent case, that the maxim: “Once an habitual criminal, always an habitual criminal,” did not hold, and that though, naturally, an accused person cannot get rid of the list of his former convictions, yet the mere fact that he was once branded

as an 'habitual criminal' does not make him so for all time. If on a later occasion the prosecution demands preventive detention on that ground, it must prove that the accused is at the time an habitual criminal.

9. *Borstal treatment*.—The same statute as that which defined the sanction of preventive detention introduced also to the Statute-Book a new type of treatment for youthful adults, known as the 'Borstal system.' The name is accidental, being derived from that of the village in which a large 'reformatory' for this type of offender had been opened for experimental treatment some few years before, with promising results. The Act of 1908 enables the Court before which a youthful offender between sixteen and twenty-one has been convicted of an offence entailing penal servitude or imprisonment, if it appears that, by reason of the convicted person's criminal habits or tendencies, or association with persons of bad character, such a course would be expedient, to sentence him or her instead to detention in a Borstal institution for not less than one nor more than three years. A similar treatment may be meted out to youthful offenders who have been convicted of a breach of the discipline of a reformatory school, and, by the Secretary of State, to any offender, being of the 'Borstal age,' who is at the time undergoing penal servitude, so that he passes the rest of his sentence in the Borstal institution. The object of 'Borstal institutions' is, according to the Act, to give such industrial training and other instruction, and to apply such disciplinary and moral influences, as will conduce to the reformation of the inmates and the prevention of crime.

Persons undergoing detention in a Borstal institution may be released on revocable license, much in the same way as persons serving a term of penal servitude, but only after six months' detention at least in the case of a male and three months in that of a female, and only if some one can be found willing to undertake to exercise supervision and authority over him or her. Moreover, on the expiry of his sentence, the inmate of a Borstal institution remains under police supervision for six months.



If such inmate is reported by the Visiting Committee as incorrigible, and as exercising a bad influence on the other inmates, he may be transferred to an ordinary prison, there to serve the remainder of his period of detention.

10. *Detention in an inebriate retreat.*—A reformatory treatment for offenders of a different type is that provided by the Inebriates Act of 1898, which authorizes the compulsory detention in a State or certified inebriate reformatory for a period not exceeding three years, of any person convicted of an offence punishable with imprisonment or penal servitude, where the Court is satisfied that the offence was committed under the influence of drink, and the offender admits, or the jury finds, that he is an habitual drunkard. Moreover, any person who is convicted four times within twelve months of any of a long list of offences consisting of what might be called ‘aggravated drunkenness,’ and who is an habitual drunkard, may be ordered detention in a certified inebriate reformatory for a similar period. Finally, where a person is convicted under the Children Act of 1908 of cruelty to his child, or the child of some person with whom he or she lives, and the Court is satisfied that he or she is an habitual drunkard, that Court may, but only with the offender’s consent, and subject to certain other conditions, substitute for a sentence of imprisonment an order of detention in a certified inebriate reformatory for not more than two years.

11. *Probation.*—Perhaps the most distinctively enterprising step taken by English Criminal Law during the present century has been the permission tentatively given in 1887, but confirmed and systematized by the Probation of Offenders Act, 1907, to the Court before which a person has been convicted of an indictable offence involving a liability to imprisonment, to release on probation, on the grounds of health, age, antecedents, or mental condition of the accused, or the trivial nature of the offence, or extenuating circumstances, the person convicted, conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour, and to appear for sentence when called on at any time during such period,



not exceeding three years, as may be specified in the order. In the case of offences summarily punishable, the Court may even go further, and dismiss the information or charge; in either case ordering the offender to make good the damage caused by his offence.

The Court may also order that the recognizance into which the accused person has been compelled to enter, shall contain a condition to the effect that the offender shall be under the supervision of a person named therein—usually the ‘probation officer’ attached to the Court, but not necessarily so. The function of this person is, subject to the directions of the Court, to visit and inform himself of the conduct of the person released on probation, to report to the Court as to his behaviour, and to advise, assist, and befriend him, even to the extent, where necessary, of finding him employment.

Should the person released on probation fail to observe the conditions of his recognizance, he may be arrested and brought before the Court (preferably that before which his case was previously heard), which, if satisfied of the facts, may forthwith impose upon him the sentence to which he rendered himself liable by his original offence.

In conclusion, reference may be made to the many steps taken by reformers of the English Criminal Law in recent years to mitigate, to the child-victims of society, the evil influences almost inevitably encountered by coming into contact with the atmosphere of crime and criminals. Most of these are now contained in the great consolidating measure known as the Children Act, 1908. We can enumerate only a few of the more important. No child under the age of fourteen can be sent to prison. Judges and magistrates have special power to deal leniently with children and young persons, even though they are convinced of their guilt. Separate courts for dealing with juvenile cases apart from the surroundings of ordinary criminals’ tribunals are provided; and to such courts no one but the parties interested, and their advisers, are admitted without the leave of the Court. It has been

pointed out in a previous chapter, that the rare power of excluding the general public from an ordinary Court of Justice may be exercised in cases in which a child is called as a witness in any proceedings relating to indecency or immorality. Finally, no child (other than an infant in arms) is allowed to be present during a criminal trial; unless such child is the person charged, or his presence is required as that of a witness.

PART V  
*THE CIVIL LAW*





## CHAPTER XIX

### THE CIVIL LAW AND ITS SANCTIONS

MORE than once, in contrasting the Criminal and the Civil Law, we have called attention to the obscurity, as well as the importance, of the distinction between them. Hitherto, we have been content to accept, provisionally, the distinction between Pleas of the Crown and Pleas of the Subject (or Common Pleas); and that distinction has, undoubtedly, great historical and social, as well as purely technical interest. But it has hardly the importance which, to a layman, would appear to justify the great differences of principle apparent in the administration of criminal and civil justice respectively; and, without further explanation, a layman is inclined to attribute these differences to that 'hair-splitting' instinct which he attributes to lawyers.

It is, therefore, important to show, if we can, that the Civil Law is different from the Criminal Law, not only in form and procedure, but in spirit and object; and that end will best be achieved by contrasting with the sanctions of the Criminal Law, explained in the preceding chapter, the sanctions of the Civil Law, the principles of which will be explained in the concluding chapters of this book. For it is in the contrast between the sanctions of the one system and the other, that we shall see most clearly the contrast between their respective spirits and objects. The sanctions of the one system (the Criminal Law), to put it shortly, are punitive, or, at least, disciplinary; those of the other (the Civil Law) are restorative or compensatory. From the former there is never entirely absent the spirit of stern reproof and chastisement; and, in its more serious aspects, these traits are intense—as any one can see who attends a trial for, say, murder or

burglary. The atmosphere of the latter (the Civil Law) is that of the business meeting, at which sentiment and moral indignation are, as a rule, entirely out of place, and the only object is to get affairs straightened up as quickly as possible. Of course the contrast must not be pushed too far ; but of its broad truth there can be little doubt.

The sanctions of the Civil Law are derived mainly from three sources—the Common Law, Equity, and the Law Merchant, the nature and history of which have been outlined in an early chapter of this book. And it will do no harm, and, perhaps, be of some little interest, if we classify these sanctions in the order named, taking first those sanctions which derive from the Common Law.

#### SANCTIONS OF THE COMMON LAW

1. *Recovery in kind, or restitution.*—The earliest actions of the Common Law were known as ‘real actions,’ i.e. actions in which, if successful, the plaintiff actually got back the thing which he had lost. They were applicable only to land, and only to such interests in land as carried ‘seisin,’ or feudal possession of land, by their owners. This fact is the key to their history. Upon the seisin of land rested the efficient carrying on of the government of the King ; because it was the feudal tenants who were responsible for the military and other services to the Crown which were indispensable for that purpose. Consequently, it was of vital importance to the King and his officials to know “how the land was set and by what men” ; and, therefore, when there were two rival claimants to the possession of a fief, it was inevitable that the King’s judges should be called upon to decide the dispute, and to award seisin to the claimant who “had the greater right.” In the interests of the King, their master, they could do no less.

But here arose a serious quarrel. As we have before seen, all feudal landholders did not hold directly of the

King ; only the 'tenants-in-chief,' a comparatively small body of great vassals. These admitted the right of the King, as their immediate lord, to decide the disputes of them, his direct vassals, in the presence of the *pares* (or 'peers') of his Court—i.e. the other tenants-in-chief of the King. This is the famous 'trial by peers' of Magna Carta, which has been so absurdly confused with the jury system.

But what the tenants-in-chief admitted in their own case, they claimed as a logical consequence in the case of their own under-vassals, and these, again, of *their* under-vassals, and so on, down to the base of the feudal pyramid. "The King must not put his ban into the fief of the vassal ; nor must the vassal put his ban into the fief of the under-vassal. The King has the ban, but not the *arrière-ban*." Such was the language of Continental feudalism. But William and his sons set their teeth hard against it in England ; and, after a century or so of bitter struggle, they achieved a brilliant victory, which broke feudalism, as a scheme of government, to pieces, and thus changed the course of English history. By the end of the twelfth century, it was admitted law in England that no action to recover seisin of land could be commenced without the King's writ. After that, it was merely a matter of the skilful use of fictions, to destroy the jurisdiction of the feudal lords over their free vassals ; though they were nominally left in control of their serf tenants, or copyholders, until after serfdom had been swept away by the Black Death of the fourteenth century. Of the interests of the serf tenants and tenants for mere terms of years, the King's judges at first took little account ; for these were not directly liable to the King for services, escheats, and other feudal dues. Thus the 'freehold estate' early became the chiefest and safest interest in land in England ; because its owner knew that, if he were unlawfully dispossessed, the King's Courts, with the weight of the King's arm behind them, would bid the sheriff 're-seise' him, i.e. restore him to possession of his land.



So brilliantly successful was this development of royal authority, that it was naturally attempted to apply it to chattels, as well as land. Glanville, the great Justiciar of Henry II, who is supposed to have written in the latter half of the twelfth century, evidently thought that it could be so applied. Glanville knows the distinction between criminal and civil pleas; but of the almost equally famous distinction of later years, between 'real' and 'personal' actions, he seems to know nothing. Apparently, according to his little book, you recover a horse or an ox which a borrower refuses to restore, and even your money which you have lent, in the same way as you recover your land of which you have been dispossessed, viz. by a writ of seisin to the sheriff.

But the difficulties of this process, in the case of some chattels, are obvious. Suppose the defendant says: "I'm sorry, but the ox died on me. I can't give it you back." The man may be a liar, or he may be perfectly honest. But, in either case, if the sheriff cannot find the ox, he cannot restore it to the plaintiff. Unlike land, an ox, a sheep, a horse, a coin can disappear or be destroyed. Even Glanville seems to see this when he says that if the thing has perished or been lost while in the borrower's custody, the borrower is bound to return the lender a 'reasonable price.' But he does not say how this price is to be recovered.

About a century later than Glanville, we find Bracton, the first systematic expounder of the Common Law, boldly tackling the difficulty. It is quite settled, he writes, that no real action will lie to recover a movable itself. You bring a personal action (the action of *Detinue*) to recover the movable; but you must put a price upon the movable, and if the defendant chooses to pay the price and stick to the movable, he can do so, and, by the judgment in the action—to return the movable or pay the value—he will get a good title to the article, if he elects to do the latter. This (to us) amazing doctrine continued to be open to dishonest defendants for six centuries, mitigated only by the cautiously exercised excep-



tion, that Equity, in the case of very rare and valuable articles, would decree specific restoration against an unlawful detainer. Then, in one of the procedural reforms of the mid-nineteenth century, the Court was empowered, in any action for the detentions of a chattel, on the request of the plaintiff, to compel the defendant to deliver up the chattel, instead of keeping it and paying its value. Long before that time, too, by the clever use of fictions, copyhold and leasehold interests in land, though not, as we have said, properly the subject of 'real' actions, had been made recoverable *in specie* by the action of Ejectment, which had, in effect, superseded the now obsolete 'real actions,' even for the recovery of freehold estates. Thus, by the middle of the nineteenth century, the Common Law sanction of recovery in kind, or restitution, had been made applicable to all appropriate cases.

2. *Damages*.—But, as the jurisdiction of the King's Courts grew, and new offences came within their cognizance, it became impossible to apply the remedy of recovery in kind, or restitution, in all cases. If, for example, I complain that a man has assaulted me, it is no good my asking to have the assault back again. Or if he has trespassed on my land, I do not want him to deliver another trespass. In the ancient days, the complainant would, perhaps, have been allowed to retaliate in kind; but the growing feeling for order and authority was beginning to be impatient of such primitive remedies. So, about the end of the thirteenth century, the King's Courts adopted the practice of ordering the offender to make financial amends for his wrong-doing to the party injured. At first, apparently, owing to the scarcity of coined money, these amends took the form of a rough equivalent of the defendant's goods. The old writ of *Levari Facias* ordered the sheriff to seize of the defendant's goods and chattels so much as should be equal in value to a certain sum, and hand them over to the plaintiff in satisfaction of his claim. Somewhat later, the far superior *Fieri Facias* ordered the sheriff to 'make by sale' of the

defendant's goods and chattels the sum of £—; and pay it to the plaintiff in discharge of his claim. This is the commonest sanction employed by the Civil Courts at the present day; and it ends perhaps eight out of ten of successful civil actions. The defendant pays the damages, or the plaintiff 'puts the brokers in.' But, by a further extension of the idea, a defaulting defendant's lands, as well as his stocks, shares, and other securities, can also now be got at to satisfy damages; though the older barbarous practice of imprisonment for non-payment of ordinary debts or damages was abolished in 1869. It is advisable to say something in detail about this very important sanction of the Civil Law, and especially as to what is called the 'measure' of damages—i.e. the principle on which they are assessed.

Generally speaking, the principle is: that the plaintiff, so far as money can do it, is to be placed in the position which he would have occupied if the defendant had not committed the offence for which he (the defendant) is cast in damages. That reads easy enough; but a little thought will show that it is not always easy to apply it.

For example, where the offence complained of is a mere breach of contract, it would not be reasonable to apply the principle in its naked simplicity. Thus, when a firm of mill-owners sent by carrier a mill-shaft which had been despatched from a foundry after repair, and the carrier was guilty of delay in delivery, the carrier was ordered to pay as damages a sum which represented the average loss which would have been suffered by the mill-owners in ordinary circumstances as the consequence of the delay; not the loss which, as a matter of fact, the mill-owners had suffered by failing (owing to the absence of the shaft) to secure a specially valuable contract offered to them. The reason is, that the parties, by their contract, had imposed duties upon themselves, and that these duties had to be measured according to the consequences reasonably anticipated by themselves to flow from a breach of such duties. In other words, damages for breach of contract are calculated only upon the 'reason-

able and probable ' consequences of the breach, i.e. those which both parties foresaw or might have foreseen. That is really a part of the bargain. If either party wants to guard against any special loss of a character unlikely to be contemplated by the other, then he must expressly stipulate for it by warning that other of the special loss which may occur through a breach of the contract.

But the case of a 'tort,' i.e. a civil offence not being a breach of contract, is somewhat different. In such a case, the principle has full play, however unexpected the results. For here the offender is not merely breaking a bargain, he is breaking the law of the land, and must take the consequences. Thus, where the employees of a charterer knocked down a plank which had been placed across the hold of a ship, and the plank, falling into the hold, which was full of benzine fumes, set fire to and destroyed the ship, the charterer was held responsible for the whole loss, notwithstanding the almost unprecedented character of the mischief. The mischief was, however unanticipated, the direct result of the carelessness of the charterer's servants, for whose acts he was responsible. On the other hand, even in cases of tort, remote consequences of the unlawful act cannot be taken into account. Thus, in the case last put, the fact that the destruction of the ship just before a rise in shipping rates caused the ship-owner to miss opportunities while another was being built, would not entitle him to claim damages beyond the market-value of the ship at the time of its destruction.

Finally, there are one or two expressions concerning damages which have crept from professional into popular language, and therefore require a word of explanation. 'Nominal damages' are said to be given, when some trifling sum, such as a shilling, is awarded to emphasize the fact that, while the plaintiff's rights have unquestionably been infringed, he has suffered no material loss. For example, A breaks a contract with B for the supply of coal. B goes into the open market and buys coal at a cheaper rate than that which he had agreed to pay A.



B has suffered no material loss by A's breach of contract—rather the other way. Yet he is clearly entitled to damages; because every breach of contract gives rise to an action for damages. Or, again, A walks casually across B's field on his way to the railway-station. B would not have known it unless he had seen it or been told the fact. Yet he is entitled to nominal damages; and the judgment awarding them will be a useful record of B's protest against the trespass, and perhaps prevent a future claim by A to have a right of way across the field.

'Vindictive damages' are a departure in principle from the true measure of damages, but are not infrequently awarded in cases of tort, and even, though much more rarely, in cases of breach of contract. They deliberately exceed the mere material loss suffered by the plaintiff, and are intended to mark the disapproval by the Court or the jury of the defendant's conduct. Thus a peculiarly cowardly and unscrupulous libel, a particularly high-handed or insulting trespass, may be visited by awards of damages intended to punish the offender rather than to compensate the plaintiff. In contract cases, the chief example is the famous 'breach of promise,' where the defendant has added to his legal offence by seducing and deserting the plaintiff, or has otherwise behaved scandalously.

'Contemptuous damages' mark the disapproval by the Court or jury of the conduct of a successful plaintiff. The award of them is equivalent to saying to the plaintiff: "You are technically right, but morally wrong." Thus, if the plaintiff alleges that the defendant wrote and published of him to the effect that he (the plaintiff) had stolen a coat from the lobby of an hotel, and the evidence in the case, while failing to show that the plaintiff had stolen a coat from an hotel, showed a long line of convictions of the plaintiff for stealing other things in other places, the plaintiff would (in the absence of privilege) be entitled to damages; but the jury might estimate the value of his damaged reputation at a farthing. Such a verdict would have an important bearing on the question



of costs ; and the large discretion exercised by the Court in the matter of costs is another way by which the strict principle of the measure of damages is modified to suit individual cases.

It is a melancholy example of the poverty of the language of English Law, that it can find no better word than 'damages' for the compensation which it awards in civil cases ; for the confusion between 'damage' i.e. the loss which is the cause of the award of 'damages,' and 'damages' themselves, is an endless source of perplexity to students of that law. But it would be hopeless now to try and alter the practice.

### EQUITABLE SANCTIONS

We have before referred to the mysterious blight which, at the end of the thirteenth century, appears to have fallen upon the activities of the Common Law Courts. After their brilliant predecessors of the mid-twelfth and early thirteenth centuries had passed away—the men who had really built up the Common Law and its sanctions—the King's judges seemed to lose the inventiveness and originality which had produced the earlier stages of the Register of Writs, and the sanctions of restitution and damages. More than that, it seems that they even allowed some of the sanctions which their predecessors had freely used, to die out. Restitution and pecuniary damages became the only sanctions of the Civil Law.

Naturally, the new Court of the Chancellors, the Equity tribunal which, as we have seen, made its appearance in the fourteenth century to supplement the deficiencies of the Common Law, found its opportunity in this state of things. And, in fact, as we shall see, the greater number of the sanctions of the Civil Law now in force have an Equity origin ; though of course, since the passing of the Judicature Act of 1873, they have been freely grantable in all branches of the Supreme Court, and even, to a large extent, by the County Courts. But, this change not-

withstanding, they have retained one or two peculiar characteristics of their origin which are not quite easy even for lawyers to understand, and which will, therefore, be the better understood for a few preliminary words of explanation.

Common Law remedies are a matter of right, or, as it is put, *ex debito justitiæ*. That is to say, if a man proves that another has trespassed on his land, or broken his contract, or infringed his patent, the injured party has a right to damages, however much his own carelessness or even moral misconduct may have contributed to his loss ; unless, of course, some express statute, such as the Limitation Acts, has deprived him of them. But the origin of Equity was the King's 'grace,' or favour ; and a favour cannot be demanded as of right. Consequently, it is said to be a rule of Equity that all its remedies are discretionary, and can be withheld or granted at the option of the Court, after considering all the circumstances. Perhaps this rule would be better stated by saying that equitable remedies are discretionary *when there is an alternative common law remedy for the same wrong*. The writer questions whether, in matters in which Equity exercised an 'exclusive' jurisdiction—i.e. which the Common Law Courts entirely refused to entertain—Equity could ever have refused a remedy which had once been recognized as in the armoury of the Court ; however careless, or tricky, or unreasonable the conduct of the plaintiff. To take a conspicuous example, would it have been possible for the old Court of Chancery, or, consequently, the new Courts which have inherited its business, to refuse to administer a trust, on the ground that the beneficiaries had behaved badly ?

But, in matters of 'concurrent' jurisdiction, where the historic function of Equity is to supplement the Common Law by alternative remedies, then it is quite clear that the remedies of Equity, both before and since the Judicature Acts, are discretionary. The Court may refuse a decree of specific performance on the ground that it could not supervise the execution of its own decree ; it may refuse

an injunction on the ground that the offence complained of is trifling, or that the plaintiff has 'asked for trouble,' or that he has not 'clean hands,' or even that the balance of convenience is on the side of leaving the plaintiff to his alternative remedy of damages. For, in these cases, the Court will not be turning away empty a suitor with a legitimate grievance, but only giving him one remedy instead of another. At the same time, it must be clearly understood, that equitable remedies are not capriciously refused. In the ordinary way, they will be granted as of course in ordinary cases. It is only when special circumstances are present that they are refused.

The second peculiar characteristic of equitable remedies is, that they cannot be enforced to the disadvantage of persons with legal rights, unless these latter persons have been guilty of some lapse of conduct which would render it, in the view of the Court, inequitable for them to insist on their legal rights. This important characteristic derives from the original character of the Chancellor's tribunal, as a Court, not merely of 'grace,' but of 'conscience.' The original function of the Chancellor, as an ecclesiastic and the 'Keeper of the King's conscience,' was not so much to compensate the plaintiff for the loss which he had sustained by the defendant's misconduct, as to purge the defendant's conscience from the load of guilt which it had incurred by his inequitable conduct. It is quite true that, in many instances, the results of the two methods are the same—e.g. where a trustee who has lost £500 of the trust money through negligence is ordered to repay it to the trust fund out of his own pocket. But this is by no means always the case. For example, a trustee speculates in his own business with a trust fund, which is, of course, a gross breach of trust. For a wonder, he not only gets it back, but makes a large profit—say £5,000. He replaces the sum borrowed; the interest has been regularly paid to the beneficiaries; and the latter may be totally unaware that the breach of trust has taken place. Moreover, in the ordinary meaning of words, they have suffered no loss. Yet, if the facts



are discovered, the trustee can be ordered to pay to the trust fund the whole of the £5,000 profit made by him in the speculation, and be sent to prison if he doesn't. He cannot be allowed to keep for himself money gained by a breach of trust. It would be a load upon his conscience, for which, in the language of a mediæval Chancellor, "il sera dam in hell."

Conversely, if the defendant's conscience has been quite clear, and his position is correct at the Common Law, no equitable remedy can be used against him, however hard the rule on equitable claimants. To take the simplest case. A and B, trustees, conspire together to sell the trust property and pocket the proceeds. They offer the property to C at a fair price ; and C, having no suspicion of wrong-doing, though he knows there is a trust, and having taken every precaution required by statute or judiciary law of a prudent purchaser in such cases, pays his money and gets a legal conveyance of the legal title of the trustees, who immediately bolt with the money. C cannot be called upon by the defrauded beneficiaries to restore the property, though, in a sense, it was 'their property.' For the rights of the beneficiaries were equitable only, and those of C, though later in date, were legal, and, moreover, C's conscience is clear. Needless to say, if C were a party to the trustees' fraud, the case would be entirely different. Owing to recent important changes in Property Law, the requirements imposed upon the person who used to be known as the "purchaser for value without notice" have changed also, as will be later explained. But the principle is the same. If the legal owner's conscience is clear according to equitable standards, he cannot be touched.

We proceed now to enumerate the specifically equitable sanctions or remedies.

3. *Decree*.—We take this first, because it is characteristic of all equitable remedies. The Common Law is said to act *in rem*. Its language is : 'It is adjudged' (that the plaintiff recover seisin, or that damages be recovered against the defendant). Equity acts *in personam* ; its



language is : " It is ordered (or decreed) that the defendant do so and so." The common law judgment is left to the sheriff to execute ; the decree or order in Equity must be obeyed directly by the party to whom it is addressed, on pain of committal to prison for contempt of Court. Much more flexible and comprehensive remedies than the mere restitution of property or payment of damages result from the decree. Take the typical case of a decree for redemption of mortgaged property, upon which a loan has been advanced by the defendant (the ' mortgagee ') to the plaintiff (the ' mortgagor '). The former has been in possession of the property for some years. Some interest has been paid ; some is in arrear. The mortgagee has received some of the rents ; on the other hand, he has expended money in repairs. The mortgagor declares that the balance is in his favour, and that he ought to get back his property at once. The Court decrees a redemption, but requires the mortgagee to bring in an elaborate account, showing incomings and outgoings. If the balance is favourable to the mortgagor, the mortgagee is to reconvey the property to him at once ; if not, the mortgagor is to have six months in which to pay what is due, or be for ever ' foreclosed,' or deprived of his property. Or the Court may even order the property to be sold and the proceeds divided. All this is very different from the simple judgment for restitution or damages, which would be utterly inadequate for the case supposed. Other forms of decrees will appear later.

4. *Administration of estates*.—This was an early and obvious result of the equitable jurisdiction in Trusts ; and it is, perhaps, the very oldest of equitable remedies. It was idle to order a recalcitrant trustee to carry out his trust, unless the Court were prepared to stand over him, so to speak, and insist on his doing it properly. Obviously, again, the Court could not send its officials all over the country to instruct trustees in their duties. Consequently, from a very early date, it took the management of trusts into its own hands, and, through its elaborate organization of officials—Masters, Clerks of various kinds, Controllers,

Agents, Record keepers, and the like—practically became itself a trustee on a large scale, administering trust property, consenting or withholding consent to the marriages of ‘wards in Chancery’ (i.e. persons interested in trust funds administered by the Court), deciding how orphans should be educated and paying for such education out of “monies in Court to the credit of the said trust,” and performing countless other functions. When freehold estates were made for the first time devisable by will in 1540, testators, not unnaturally, ‘charged’ various provisions for younger children and others on their estates; and, as the Common Law Courts had no machinery for raising or realizing such charges, the business fell to the Court of Chancery, for the ordinary testamentary tribunals, being Church Courts, could not touch land. Finally, with the decay of the Church Courts in the sixteenth and seventeenth centuries, the Court of Chancery became the usual jurisdiction for the administration of deceased persons’ estates generally; and the vast administrative machinery of the Court began to acquire that reputation for sloth, complexity, and even worse defects, which were so happily satirized by Charles Dickens, the novelist, in the mid-nineteenth century. Fortunately, his efforts bore real fruit; and the abuses of the Court were rapidly reformed in the third quarter of the century, without, however, depriving Equity of any of its valuable administrative remedies.

5. *Injunctions*.—An injunction is a special form of decree, essentially prohibitive in character, and usually somewhat limited in scope. It orders the defendant to cease or refrain from doing an illegal act. In its earlier stages, it seems to have been used chiefly to prevent a person exercising his common law rights in a manner which Equity regarded as inequitable. Thus, for example, if a mortgagee, after Equity had laid down the principle that all mortgages were redeemable at any time, refused to reconvey the property when the mortgagor was ready to pay off the debt, and sought to eject the mortgagor in the Common Law Court on the ground that he, the mort-

gagee, was the legal owner of the land, the mortgagor would begin a redemption suit in Chancery, and ask for an injunction against the mortgagee, forbidding the latter to continue his ejectment action; and this injunction would be granted as of course.

Naturally, this practice led to friction between the Court of Chancery and the Common Law Courts; because, in effect though not in form, it prevented the Common Law Courts entertaining lucrative actions. A rather disgraceful struggle between the two jurisdictions ensued, which was ended in favour of Chancery by the wisdom of King James I; but the practice of granting injunctions to prohibit lawsuits in Courts of co-ordinate jurisdiction was really scandalous, and, it having become totally unnecessary by the policy of the Judicature Acts, was by them abolished.

Meanwhile, however, the practice of granting injunctions as *aids* to Common Law proceedings had been steadily developed by Chancery, and is now admitted to be of the highest value. Thus, for example, if A asserts that he has a right of way across a field belonging to B, and proceeds to exercise it, B's only common law remedy, if he denies A's right, is to sue A for trespass on each occasion on which A crosses his field. Probably he will only get nominal damages in each case; and the costs will be ruinous. But, by adding in his first action a claim for an injunction, B will not only get the question of right decided, but, if successful, unless A renounces all further claim, B will get against A an order prohibiting him (A) from continuing his unlawful acts, on pain of being put in prison if he disobeys. Such orders are invaluable in preventing impecunious and obstinate wrong-doers compelling owners of property to engage in a continual series of lawsuits at their own expense.

But a still greater advantage of an injunction is, that it may be granted to prevent the doing of a merely apprehended wrong. Thus, if my neighbour is engaged in building operations which I fear will, when completed, darken my windows, it is much better for both of us that,



if he is really contemplating a legal wrong, he should be stopped at once, instead of having afterwards to pay heavy damages or to pull down a costly building. So I need not wait until my windows are actually darkened, before bringing an action for an injunction, though I cannot, of course, claim damages for a wrong which has not yet been committed. If the Court, on hearing the case, decides that my neighbour's plans will, if carried out, injure my legal rights, it will grant the injunction ; unless my neighbour will voluntarily agree to modify his plans to avoid the danger.

It has been said above, that an injunction is essentially prohibitive in character. Nevertheless, the Courts not infrequently grant what is called a Mandatory Order to restore the *status quo* which has been altered by the defendant. Thus, in the case above put, if my neighbour, hearing of my intention to bring an action, should crowd on work all night and Sundays to get his wall up before the Court can hear my claim to an injunction, this would not help him. If the Court took the view that my claim was right, it would order my neighbour to pull down his wall, at any rate to the extent necessary to restore my light. In former days, there was considerable ingenuity in the wording of such orders, to maintain the prohibitive form of the injunction. My neighbour would be forbidden " to continue to allow the wall to remain un-pulled down." But this reverence for form, as distinct from substance, has long since disappeared.

One other very interesting feature of injunctions deserves mention. It is, of course, an essential feature of English justice that no sanction shall be applied until the facts, and the law applicable to the case, have been thoroughly established. But this process may take time ; and, meanwhile, the injury sought to be remedied may be causing immense harm. In such a case, the plaintiff may apply to the Court for an 'interlocutory injunction,' i.e. an injunction to take effect temporarily, till the rights of the parties are ascertained ; and this application, if really urgent, may be made *ex parte*, i.e. without notice to the



defendant. Obviously, if the Court grants the request, especially in the latter case, it runs a serious risk of inflicting hardship on the defendant, if it should ultimately appear that he has not been doing or contemplating any wrongful act at all; as, for example, when a big building operation is stopped, at a cost of thousands of pounds. To avoid this danger, the Court, as a condition of granting an interlocutory injunction, always requires the applicant to "enter into the usual undertaking in damages,"—i.e. to undertake that, in the event of the defendant proving right, he (the applicant for the injunction) will indemnify the defendant against the loss incurred by reason of his obedience to the order. This undertaking, which will be summarily enforced, entails a serious liability upon the person who enters into it.

Injunctions are usually granted to prohibit torts, actual or apprehended; but they may be also, and frequently are, granted to prevent breaches of negative contracts. Thus, if a tenant has agreed in his lease not to hold an auction on the premises, and he proceeds to advertise an auction to be held there, he may be stopped by an injunction.

6. *Specific performance of contracts.*—We have seen that the universal common law remedy for breach of contract is judgment for damages. But there are some contracts for the breach of which damages are a very inadequate remedy. Suppose I have been saving for years to buy a house which has attractions of sentiment, convenience, or beauty for me. The owner expresses his willingness to sell it to me at a certain price, and signs a contract to that effect. I want the house, not damages. The owner, perhaps tempted by a higher offer, refuses to carry out his contract. Equity, in the absence of special circumstances, will grant me a decree 'for specific performance'—i.e. will order the vendor, on pain of being committed to prison, to convey the house to me on payment of the price agreed between us, or, if he is still recalcitrant, will direct a Master of the Court to convey on his behalf.

That is, evidently, a remedy most superior to a mere

judgment for damages in many cases ; and, though it is mainly confined to contracts for acquiring an interest in land, it may also be granted of contracts to purchase stock, shares, or other permanent securities of which there is only a limited quantity, and which the purchaser cannot, therefore, buy in the open market. The Court has also power to apply it to all contracts for the purchase of goods ; but it is rarely granted in such cases.

It will be observed that, though a decree for specific performance superficially resembles a mandatory order or injunction, it is really fundamentally different, as it is essentially positive in character, and only applicable to contracts, not torts.

7. *Receivers (and Managers).*—Though only of an ‘interlocutory’ or temporary character, this very important remedy of Equity must not be overlooked. It is often vitally necessary, in view of protracted litigation, to prevent the property involved from going to wrack and ruin by neglect or speculation. Particularly is this the case in actions for dissolution of partnerships, actions on disputed claims to land, actions to realize mortgages, and the like. In such cases, the Court will appoint a receiver, as its own official, to hold and account for the income of the property, and either to pay it into Court, or, ultimately, to hand it over to the successful party. It also appoints a receiver to take in execution some property of a debtor which, for technical reasons, cannot be reached by the creditor by the ordinary legal process.

The Court is reluctant to enter, even indirectly, upon the risks of management ; but, where a business is included in a security which the creditor is trying to enforce, it will do so. It will then be the duty of the manager to carry on the business under the direction of the Court, for the benefit of the persons ultimately proved to be entitled to it.

8. *Control of documents.*—This is a very valuable and somewhat modern equitable remedy. The old Common Law Courts wavered between the primitive idea that a document was a mere chattel, like a horse or ox, valuable

for its physical qualities only, and, as an alternative, the almost equally primitive view, that it was a 'magic,' or 'charm,' which must be treated with superstitious reverence. Equity, the jurisdiction of the scholarly Chancellor, was much bolder, and realized, on the one hand, that a false or misleading document may do infinite harm if it is allowed to remain in circulation, and, on the other, that it is merely a particular form of expressing the parties' intentions. Common Law will, no doubt, refuse to enforce a forged bond, or a written contract obtained by fraud; but Equity does much more, for it orders fraudulent or misleading documents, or documents obtained by coercion, to be delivered up for cancellation or destruction. And, if it is clearly proved that a document, owing to a mistake in transcription or otherwise, does not represent the true agreement of the parties, which agreement is proved by other evidence, it will 'rectify' the document—i.e. order it to be altered to express the real agreement of the parties. Unfortunately, it cannot, in spite of the clearest evidence, do this with the will of a deceased person; for that would be to violate the express provision of an Act of Parliament to the effect that the actual will administered must be 'signed by the testator.'

9. *Declaratory Order*.—There is some dispute as to whether this very modern remedy is now a common law or an equitable sanction. Historically, it has clearly an equitable origin; and the wording of the Rule of Court, under which it is exercised, seems still to give it an equitable character. Briefly put, it is a formal expression by the Court, after hearing evidence and argument, as to the rights of the parties, not followed by any 'consequential relief,' i.e. direction to either party to pay damages or do any other act. It may even be pronounced with regard to future as well as past conduct; but it cannot be invited, of course, in a purely hypothetical case. Thus, if parties contemplating a family or marriage settlement were to ask the Court to say what would be the legal effect of a certain arrangement if embodied in a deed, the Court would reply: "Wait till the case arises." But if, after having



entered into the arrangement, the parties were honestly in doubt as to their rights, and unwilling to embark on hostile litigation, they might, either by formal action, or, in some cases, by informal summons, ask for the opinion of the Court to guide their future conduct. Doubtless such a remedy, if it can be classed as a sanction at all, is open both to theoretical and to practical criticism. It is certainly inconsistent with the general principle of English judiciary law: that every judgment is the result of hostile, or at least, adverse action by one person against another. And the practical dangers of making a judicial declaration on a point which may at some time be the subject of really hostile controversy among persons not parties to the proceedings, are obvious. Nevertheless, the declaratory judgment, used with caution, is a valuable weapon in the armoury of civil justice. It would, of course, be wholly out of place in criminal proceedings.

#### SANCTIONS OF THE LAW MERCHANT

Of these the only two which there is space to deal with are Bankruptcy and the Admiralty action *in rem*.

10. *Bankruptcy*.—The essence of this sanction is, that it compels the proportionate distribution of the whole of an insolvent debtor's property among his creditors, instead of leaving the latter to obtain payment at haphazard, by pressure, favour, luck, or otherwise. It was incorporated into English Law by statute in the sixteenth century; but, for the first three centuries of its existence, it was confined in its application to merchants, for whom it is, of course, a vital necessity. Since 1861, however, all adults have been made subject to the bankruptcy laws; even married women can be made bankrupt, though only if they engage in trade. An insolvent person can be adjudicated bankrupt on his own petition or that of a creditor; and there are certain 'acts of bankruptcy,' the commission of any one of which by the debtor is *primâ*



*facie* proof of a creditor's right to an adjudication. An adjudication of a person as a bankrupt does not destroy his legal capacity; but the whole of the property (in the broadest sense) which he owned at the date of the presentation of the petition, or within three months before, vests in the Official Receiver of the Court or a 'trustee' appointed by the creditors, and is distributed as 'dividend' among those who have established or 'proved' their debts, in strict proportion to the amount thereof. Moreover, any property, including the benefit of any contract (with certain limited exceptions) coming to or entered into by the bankrupt before his discharge, can, with due regard to the interests of persons who have dealt with the bankrupt in good faith and without knowledge of his bankruptcy, be claimed by the Official Receiver or trustee, for the benefit of the creditors who were such at the commencement of the bankruptcy; creditors becoming such during the bankruptcy having no claim till the pre-bankruptcy debts are satisfied. It will readily be understood, therefore, especially as bankruptcy proceedings are by no means private, that the unfortunate bankrupt, especially if he be an honest man, has a hard struggle to earn a living; while, for the dishonest bankrupt, there is a whole list of 'bankruptcy offences' for which he can be criminally punished. Moreover, all bankrupts must undergo 'public examination' as to their affairs; and at such examination any creditors may put the most searching questions to the bankrupt with a view to discover traces of property concealed by him. Even transactions entered into by the bankrupt at any time within ten years prior to the commencement of his bankruptcy may be overhauled by the Official Receiver or trustee; and, if they appear to have been arranged with a view to defraud creditors, they will, again subject to the rights of *bonâ fide* purchasers, be ruthlessly set aside by the Court, and all property covered by them seized for the benefit of the creditors.

Not until the bankrupt has been formally 'discharged' from his bankruptcy, is he a free man again; and, even

then, he finds himself disqualified for five years from seeking Parliamentary or municipal honours. On the other hand, his pre-bankruptcy debts (with certain exceptions) are wiped out, and can no longer be enforced against him.

11. *Action in rem*.—This is a very valuable remedy applicable only to claims in respect of a ship or cargo within the jurisdiction of the Admiralty, i.e. on rivers and coasts within high-water mark. Strictly speaking, it is not a final, but only an ‘interlocutory’ remedy; for the claim of the plaintiff is not, technically, against the ship or cargo, but against the owners, and the latter can at once procure a release of their property by giving bail for the amount of the claim and costs. But the power to arrest ship and cargo may often mean the difference between complete success and complete failure of the claim—as, for instance, when the owners of the ship and cargo are foreigners having no other assets in England.

The process can only be used to enforce claims arising out of ship, cargo, or voyage, such as seamen’s wages, freight, damages to life or property by collision (limited to the extent provided in the Merchant Shipping Act), necessities purchased for the use of the ship under various circumstances, and the like. The remedy must not be confused with the extra-judicial remedy of a ‘maritime lien’—i.e. a preferential claim or security upon a ship and cargo for services rendered in respect of them; though the fact that a lien of this kind is enforced by a sale after a judgment *in rem* (i.e. binding on all persons) is very apt to cause confusion. The vital distinction between the two cases is, that, in the case of the action *in rem* the liability of the defendant is not limited to the value of the ship and cargo arrested, while a maritime lien can only be enforced against the property and not against the person. Moreover, certain claims which may be enforced by an action *in rem* do not give rise to a maritime lien.

The arrest of the ship and cargo in the action *in rem*

is carried out by the Admiralty Marshal. Vessels of the Royal Navy are not subject to arrest in an action *in rem*; nor are mail ships which have given proper security against default in manner provided by certain modern statutes.

Having now glanced at the chief sanctions of the Civil Law, we proceed to consider its substantive rules. And, in arranging the treatment of the subject, we are fortunate in finding a fairly general agreement among the jurists and legislators of civilized countries as to the divisions into which it can most conveniently be broken up. Thus, by the general practice, not only of Western Europe, but of America and such Oriental countries as have produced modern legal codes, the Civil Law of a State may be conveniently studied under the heads of (a) Family Law, (b) Law of Property, (c) Law of Obligations, and (d) Law of Succession on Death.

There is, however, one important respect in which it is not possible, or at least advisable, to follow Continental practice. Most Continental systems of law distinguish between the Civil Code and the Commercial Code. In England, mainly owing to the activities of Lord Mansfield in the eighteenth century, previously alluded to, no such distinction now exists. Commercial Law is part of the Civil Law; and, though there is a so-called 'Commercial Court,' it is really only a sitting of the King's Bench Division, ear-marked for commercial cases. Consequently, English Civil Law includes what, in other countries, would be called Commercial Law.

And it is proposed in this book to make one other departure from the Continental scheme. The Law of Succession on Death falls, inevitably, into two parts, viz. Succession on Intestacy, i.e. where the deceased died without leaving a valid will or testament, and Succession by Testament, where he left a valid will. No doubt, in a code or treatise intended to go into elaborate detail, there is much material which is common to these two

kinds of succession, e.g. collection and realization of property, payment of the deceased's debts, and the like. And this fact, in such works, doubtless justifies a separate department of Succession.

But where, as in the present book, the treatment of the Civil Law must necessarily be confined to the broadest outlines, there is much to be gained by treating the Law of Intestate Succession as a branch of Family Law, (with which it is, indeed, most intimately connected), and the Law of Wills or Testaments as part of the Law of Property, (with which also, it is closely bound up). This departure will not only avoid repetition, and thus favour brevity, but will have the advantage of grouping together topics only really intelligible in connection with one another. If it is objected, that it is no good talking about succession to property until it has been explained what property is, the answer is, surely, that everyone, layman or lawyer, has a fair working knowledge of what is meant by 'property'—sufficient, at any rate, to enable him to understand that the Law of Succession on Intestacy provides for the passing on death of what a person dies entitled to.



## CHAPTER XX

### FAMILY LAW: 1. HUSBAND AND WIFE

FOR legal purposes, a 'family,' at the present day, is the unit produced by a lawful marriage up to a limited number of steps or 'degrees' of relationship. It is not quite easy to determine where, for legal purposes, a family ends; but there are certain practical tests which seem to suggest the third degree as the limit. These are (1) liability for maintenance, which is limited to the second degree, (2) prohibition of inter-marriage, which extends to the third degree, and (3) ability to succeed on intestacy, which also extends only to the third degree, though, by reason of the death of a relative in the third degree in the life-time of the intestate, the descendants of such relative, who would, of course, be in the fourth, or even a remoter degree from the intestate, may quite possibly succeed to the latter's property.

In any case, it is obvious that marriage is the great factor in the establishment of a family, and that a summary of the Marriage Laws is a necessary preliminary to an understanding of Family Law—indeed, it forms a considerable part of it. It will, in fact, be found that, when the Law of Marriage and its legal consequences have been stated, there will be little more to say about Family Law.

Marriage may be defined for purposes of English Law, as the legalized union of two persons of different sexes, at the time of the marriage unmarried, with the object of setting up together a permanent domestic life of the completest possible intimacy, spiritual and physical. Inasmuch as such a union must, according to English Law, be entirely spontaneous on both sides, it is often described as a 'contract,' i.e. an agreement enforceable by law. But this practice has its dangers; for it leads

inevitably to the assumption, that marriage is a contract having the same qualities as ordinary contracts in English Law—a most profound error. For a marriage union differs from an ordinary contract in the facts that (*a*) it can only be effected by the use of certain prescribed forms or solemnities in which the State is represented, (*b*) its terms and consequences cannot be modified by the agreement of the parties, however clearly stated before the entry into the union, (*c*) a marriage cannot be dissolved by the mere agreement of the parties, and (*d*) even at the present day, marriage imposes on the parties certain duties, and invests them with certain rights and liabilities, not only towards one another, but towards members of the community generally. In fact, almost the only feature common to marriage and an ordinary contract is, that both are, or at least are supposed to be, entered into freely and voluntarily by parties who have full knowledge of what they are doing. But even in this respect there are differences; for it would take far more cogent evidence of fraud or mistake to render void an apparently valid marriage, than it would to dissolve an ordinary contract. The peculiarities of the marriage contract, noticed above, will serve as a ground-plan for our treatment of the subject.

#### SOLEMNITIES OF A LAWFUL MARRIAGE

Regarded from the standpoint of the mode of celebration, English marriages fall into two groups—Anglican and non-Anglican.

1. Anglican marriages are those which are celebrated according to the rites of the Established Church of England. Till the passing of the famous Marriage Act of 1753, known as ‘Lord Hardwicke’s Act,’ the rules of the Established Church on the forms of its marriages were deplorably lax; the Council of Trent, which greatly stiffened the doctrine of the Western Church on that subject, having been held after the Reformation, so that its decrees were

not binding on the English Church. So great were the evils of this state of things, that Lord Hardwicke's Act and later legislation require that an Anglican marriage shall be celebrated in a church or public chapel of the Establishment authorized for the celebration of marriages, by a clerk in Holy Orders, in the presence of two witnesses, and, except in marriages celebrated under the 'special' license of the Archbishop of Canterbury, between the canonical hours of 8 a.m. and 3 p.m. There would appear, also, to be little doubt that the use of the (or a) Marriage Service in force for the time being in the Liturgy of the Church of England is essential to the validity of an Anglican celebration. The clergyman celebrating the marriage cannot act as a substitute for a witness, nor can he lawfully celebrate his own marriage.

But, in addition to the actual requirements of celebration, every marriage must be preceded by a step or steps intended to secure publicity and deliberation before the celebration. In the case of an Anglican marriage, there is a choice of four alternatives in this respect. One of the intending parties to the marriage must procure, within three months prior to the marriage, either (i) the audible publication of 'banns' (i.e. formal announcement of intention to marry) in each of the churches of the "parishes wherein the parties do dwell," and the marriage must be celebrated in one of such churches, or (ii) a 'common' license from one of the Archbishops, or the chancellor or 'surrogate' of a bishop, or (iii) a 'special' license from the Archbishop of Canterbury, or (iv) a Superintendent Registrar's certificate, obtained in manner hereinafter described. Moreover, in the case of a common license, the marriage must take place at the church named in the license, which must be that of the parish in which one of the parties had his usual place of abode for fifteen days; and, in the case of a Superintendent Registrar's certificate, in some church within the district of the Superintendent Registrar who granted it. But the Archbishop of Canterbury's 'special license' may authorize the marriage to be celebrated at any convenient time and place.



2. Non-Anglican marriages, though classed together for legal purposes, are, in practice, sub-divided into two classes, viz. religious marriages, but not in accordance with Anglican rites, and purely civil marriages. Unhappy ecclesiastical prejudices have, unfortunately, in the past tended to conceal this important fact, and, in consequence, by the use of ambiguous language, to render the provisions of the law obscure in a matter in which they ought to be specially clear.

The preliminary of every non-Anglican marriage is the certificate of a Superintendent Registrar of Births, Deaths, and Marriages, an official appointed for every Poor Law Union. Such certificate is procurable, if it is intended to be the sole authority for the marriage, on giving notice in writing of the intended marriage to the Superintendent Registrar of the district in which each of the parties has lived for at least seven days; and this notice must, after being entered in the Marriage Notice Book, be exhibited in the office of the Registrar for twenty-one days. The marriage may then be celebrated in a building in the Registrar's district registered for the celebration of marriages, by an 'authorized person' (i.e. the person authorized by the trustees or other governing body of the building to solemnize marriages therein), or in the Superintendent Registrar's office by him. In the former case, 'registered building' and 'authorized person' mean respectively Nonconformist place of worship and minister; and, in such cases, any religious ceremonial may be used which the parties prefer, provided only that the essential words prescribed in the Marriage Act of 1836 are used. In the latter case, no religious ceremony is permitted; though again, of course, the parties are at liberty to go through any religious ceremony of marriage that they please, either before or after the civil marriage, or both.

But a more expeditious proceeding may be adopted by persons in a hurry. For if the Marriage Notice given to the Superintendent Registrar contains a statement to the effect that it is intended to celebrate the marriage by virtue of his license, the Notice is not exhibited in his office,



but is merely entered in the Marriage Notice Book, and, after one clear day from such entry, the Superintendent Registrar must on request issue to the party giving the notice, not only a certificate, but also a license to marry at the registered building named in such license. But, for a proceeding of this kind to be valid, the notice must be given to the Superintendent Registrar of the district in which one of the parties has had his usual place of abode or residence for fifteen days immediately preceding the notice; though no notice to the Registrar of the district in which the other party lives is, apparently, necessary.

Moreover, every Marriage Notice intended to lead to a Registrar's certificate must be accompanied by solemn declarations of both parties that, to the best of their belief, there is no lawful impediment to the marriage, and that, in the event of any party being under age (and not a widower or widow) the consent required by law to the marriage of infants has been obtained. Untruth in this declaration will entail the penalties of perjury. A similar statement on oath, with similar penalties attached, is required from the applicant for an ecclesiastical license (common or special) to marry.

A word must be said on the subject of the consents of third parties sometimes required by law to the marriage of minors, not being widowers or widows. Broadly speaking, where the marriage is by license or on a Superintendent Registrar's certificate, the consents of both parents, or the surviving parent and the guardian appointed by the deceased parent, are necessary to such marriages, or, if both parents are dead, the guardian or guardians appointed by the deceased parents or the Court. In the case of illegitimate children, the consent of the mother only, or, if she is dead, the guardian appointed by her, is required. Such persons can, in the case of marriage after publication of banns, 'forbid the banns,' i.e. refuse to allow the marriage. But the Court may, in the case of refusal by such persons to consent to a marriage, if it thinks that such consent is being un-

reasonably withheld, give consent to the marriage. And, in any case, want of consent by a third party will not invalidate the marriage, though it may entail other penalties.

There are important special provisions as to the marriage of Jews and Quakers, with which we cannot deal. With regard to marriages celebrated abroad, the general rule of English Law is, that they are regarded as valid, so far as form is concerned, only if they are celebrated in accordance with the forms recognized by the law of the country in which the marriage takes place. But there are various provisions affecting the marriages abroad of British subjects, which are also too technical to be detailed here.

### LEGAL CONSEQUENCES OF MARRIAGE

As was stated above, the celebration of a lawful marriage immediately changes the legal position of the parties, not only towards one another, but also towards the other members of the community. And these changes cannot be prevented, or speaking generally, even affected, by any agreement entered into by the parties, either before or after marriage. Until recently, these changes, at any rate in the case of the wife, were so great, that they placed her in that exceptional and unalterable legal position known as a *status*. Owing to the great alterations recently made in the law affecting married women, the legal effects of marriage are so much less striking than formerly, that we no longer regard married women as an exceptional class. Nevertheless, the legal consequences of marriage are still so considerable as to deserve attention.

We have already, in dealing with the Criminal Law, referred to the peculiarities affecting the married woman, and (to a less extent) the married man, in the matter of giving evidence, liability for harbouring, and the like. Here we may deal shortly with (a) the *consortium*, as it is called, of the parties to a marriage, i.e. the mutual duty to carry on a life in common, (b) the proprietary relationships of husband and wife, and (c) the husband's liability

to third persons for contracts entered into by his wife or for torts committed by her.

(a) It is undoubtedly the legal duty of husband and wife to cohabit with one another; and this duty is recognized by the decree for the restitution of conjugal rights, which will be issued by the Court if one of them, without due cause, deserts the other. But, so obvious is it that a cohabitation secured by force or punishment is worthless for serious purposes, that the Courts have long ceased to attempt to enforce such decrees, even by the indirect method of imprisoning persons who refuse to obey them. As a matter of practice, restitution decrees are now only obtained as convenient preliminary steps in proceedings intended to lead up to judicial separation or divorce—a most curious perversion of their original purpose.

But if husband and wife cannot be compelled to live together, they can, at least, be compelled to contribute to one another's support in case of necessity. In the case of the husband, this liability is effectively enforced. If his wife becomes chargeable to the Poor Law, he can be prosecuted for neglecting to maintain her, and compelled to refund to the Guardians the cost of her maintenance. By the Summary Jurisdiction (Married Women) Act of 1895, a husband who ill-treats his wife, or wilfully neglects to provide reasonable maintenance for her or her infant children (including her children born before the marriage), and thereby compels her to live apart from him, may be ordered to pay to her, or to an officer of the Court or a third person on her behalf, a sum not exceeding two pounds a week; and, by recent legislation, a wife need not even leave her husband before applying for such an order. Most effective means, perhaps, of all, for persons in easy financial circumstances, a wife deserted and left without means of adequate support may "pledge her husband's credit for necessaries," i.e. incur debts for goods and services necessary for herself and children, which debts the husband will be legally liable to discharge.

A wife, for the support of her husband, can only be



proceeded against in respect of Poor Law maintenance ; and, even then, her liability will be limited to her separate property. In other words, a husband can be made to work for his wife's support ; a wife cannot be made to work for her husband's. On the other hand, the husband, by reason of his greater liabilities, is entitled to determine the place of the matrimonial home, and the scale of living adopted ; though, of course, a wife can spend her own money as she pleases.

(b) The proprietary relationship of husband and wife has been profoundly altered by the legislation of the last half-century. The old 'unity' which gave the parties many reciprocal rights in one another's property, has now entirely disappeared ; and, save for the fact that a surviving spouse ranks among the successors on the intestacy of the deceased spouse (an expectancy which can, of course, be easily defeated by the testamentary dispositions of the deceased), neither of them has any rights whatsoever in the property of the other, except so far as they are conferred by settlement or other voluntary arrangements. They can even sue one another for breach of contract ; and a wife can sue her husband for torts (such as trespass, damages, etc.) to her separate property. But husband and wife cannot otherwise sue one another for torts at all—a rule which appears to be more sentimental than just. Suppose a husband or wife to utter deliberately the grossest libels against the other. Why on earth should not the wronged party have his or her ordinary remedy as a citizen ? Is it supposed that the harmony of a household in which such events occurred would be further disturbed by legal proceedings ?

But perhaps the most important proprietary change effected by the act of marriage is, that by it, and only so long as it continues, a woman becomes capable of holding not merely separate property, but property 'restrained from anticipation,' i.e. tied up in such a way that she cannot alienate it, directly or indirectly, or even anticipate the income of it. This is an extraordinary privilege, probably the greatest change ever made in



recent times in English Law by mere judicial decision ; for, as we shall see when we come to deal with the Law of Property, it is an essential principle of English Law, that the absolute ownership of property of any kind carries with it indefeasibly the right of alienation, except in this one instance. And this exception is really so important and leads to such curious results, that a word or two of explanation of it will be useful.

The expression "separate property of a married woman" is familiar and intelligible to lawyers, who know that for centuries such property could only be created by express words in the documents conveying it to the married woman or her trustees. But it is now really an anachronism, and apt to puzzle the layman. *All* a married woman's property, whenever and however acquired, is her own property ; and no part of it is more 'separate' than another. That is the general rule of law, as laid down by the Married Women's Property Act of 1882. But a woman before her marriage, or during her marriage, or her father or any other person who wishes to endow her, may convey property to trustees, to be held for the married woman 'without power of anticipation.' This means, in effect, that not only will the married woman herself be unable to sell, mortgage, or charge the property directly, but that she will only be entitled to draw the income as it falls due, and that any debts, promises, or engagements made by her before any instalment has fallen due, cannot be enforced against that instalment or any subsequent instalment.

Thus, suppose a married woman so 'restrained' to have spent all her dividends, and greatly to desire, and at once, a handsome fur stole which she sees in the window of a shop at which she deals habitually. She says amiably to the furrier : "I shall have no money till next month ; but if you will let me pay you then, I'll buy it now." The furrier assents ; and, when the next quarter's dividends arrive, the married woman refuses to pay. The furrier has no remedy, so far as the property restrained from anticipation and its dividends are concerned. Nor would

it have made any difference if his customer had ordered the goods without making any special stipulation. More, if, after she received the dividends, the woman's husband were to die, and so her power of holding 'without anticipation' ceased, the tradesman still could not get at the dividends received before the husband's death, but after the order was given; even though they were lying in the widow's bank. It is evident that, under cover of this institution, many frauds may be perpetrated on innocent creditors; and it is satisfactory to know that a woman cannot defraud her existing creditors by settling her own property upon herself 'without power of anticipation.'

(c) We come, lastly, to the liability of husband and wife to third parties for obligations created by their contracts and torts. And we may say at once that this mutual form of statement is only used for purposes of symmetry; for no wife is legally responsible for her husband's contracts or torts, unless, of course, she has joined in them personally.

The case of the husband is very different. At the Common Law, a married woman had no power to contract, and no liability for contracts. Consequently, her 'pre-nuptial debts,' as they were called, devolved on her husband, who was personally liable for them; and, after her marriage, she could only contract as her husband's agent. Under the new law, the husband takes over no liability for his wife's pre-nuptial debts, except to the extent of property received from or through her as a consequence of his marriage; while the wife remains solely liable for all contracts entered into by her both before and after her marriage, except those into which she enters as her husband's agent. She is, however, as regards her debts contracted during marriage, only liable to the extent of her property not restrained from anticipation.

Owing to the intimate relationship between husband and wife, the question of when the wife may be supposed to contract as her husband's agent is often difficult to determine. In the cases of 'express agency,' i.e. where the husband has expressly authorized her action, there is no serious difficulty, except that of proving the facts.

But in what is called 'implied agency' the matter is different. Any woman who lives with a man as the mistress of his household naturally orders what may be called 'supplies' from the neighbouring tradesmen; and the latter naturally assume that the man will discharge the bills. In this view, if they act honestly and reasonably, they will, *primâ facie*, be justified, especially if the man has previously paid similar bills. But they take the risk of the man being able to prove, either that he supplied his wife or housekeeper with sufficient money for household expenses, or that he had expressly forbidden her to pledge his credit. And, in such a case, they will be able, in all probability, to recover the money neither from the husband nor the wife—not from the former, because he did not authorize the contract, not from the latter, because they did not give credit to her.

In the matter of torts, it is still a survival of archaic law, that a husband is personally liable, along with her, for all the torts committed by his wife during the marriage. He can, however, escape liability if he obtains a judicial separation, or, *à fortiori*, a divorce from her before judgment is obtained against him by the party injured by the wife's tort. This naturally brings us to—

#### DISSOLUTION AND RELAXATION OF MARRIAGE

Persons ostensibly married may (a) have their marriage declared null, i.e. void *ab initio*, or they may be (b) divorced, or (c) judicially separated, for matrimonial offences committed during a valid marriage.

(a) A 'decree of nullity' can, naturally, only be pronounced of a marriage which was never validly made at all. Putting aside the question of the proper form of contracting marriage, already sufficiently discussed, we may say, that a decree of nullity may be pronounced on the grounds of (i) kinship between the parties (ii) want of age (iii) want of consent (iv) physical impotence, and (v) evidence of a previous valid marriage of either party, still



subsisting at the date of the alleged 'marriage.' Of these in their order.

(i) *Kinship*.—All lineal relationship, whether by blood or marriage, between the parties, is a bar to marriage. The tablets with which we are familiar in country churches tell us not only that a man may not marry his grandmother, but that he may not marry his wife's grandmother. Marriage between collateral relatives up to the third degree, by blood or marriage, is also prohibited; so that a man may not marry his sister, aunt, or niece, or his wife's aunt or niece, and *vice versâ*. But by recent statutory alterations in the law, a man may marry his deceased wife's sister, and a woman her deceased husband's brother. It is said that illegitimate relationships are as prohibitive as legitimate.

(ii) *Want of age*.—A male person cannot contract a binding marriage till fourteen years of age, nor a female till twelve. But marriages under these ages are not absolutely void; and cohabitation after attainment of the legal age is said to amount to confirmation.

(iii) *Want of consent*.—Marriage being, as has been said, a voluntary act, it follows that any circumstances sufficient to show that there was no consent of one of the parties to it, are sufficient to render it null and void. Such cases are not frequent; but they may arise from various causes. Thus, for example, a lunatic 'so found' is incapable of contracting a valid marriage; and a mentally unsound person who, by reason of his unsoundness of mind, is unable to understand the nature of marriage and its legal consequences, is similarly incapable. In such cases, it matters nothing that the other party to the marriage was aware or unaware of the existence of the lunacy or insanity; except that, in the latter class of cases, the other party, no less than the representatives of the insane party, may seek a decree of nullity. The care with which the solemnities of the forms of marriage are now safeguarded, renders it difficult to suppose that any sane person could be deceived as to the fact that he was entering into a marriage; but there are a few cases in which young girls have been



trapped into going through the marriage ceremony under the belief that it was only a betrothal. So also, it must be rare, for similar reasons, that any one can be forced into going through a marriage ceremony against his or her will; but such cases occasionally occur. So also, presumably, if a blind person were persuaded to go through the ceremony of marriage with A, believing him to be B. In all these cases, if the evidence were clear, the Court would, probably, pronounce a decree of nullity, at the suit of the injured party, on the ground of mistake.

(iv) *Physical impotence*.—Inability to beget or bear children is not in itself a legal bar to marriage; but inability to perform the act necessary for generation or child-bearing is. Without dwelling upon this curiously illogical attitude of the law (inherited, of course, from the Canonical Code), we may simply state that if, after the lapse of a reasonable time for proof, it is established to the satisfaction of the Court that either party to a marriage has, ever since the marriage, been unable to take his or her part in the act of generation, the Court will pronounce a decree of nullity; and refusal or unwillingness to attempt the act will usually be accepted as proof of incapacity. But such a marriage remains valid until it is legally nullified; it cannot be nullified after the death of either party; and a decree of nullity will only be granted to a petitioner with a real grievance, who seeks the remedy with reasonable promptitude. It is, perhaps, unnecessary to say, that impotence supervening after the celebration of the marriage will not be a ground for a decree of nullity, or even of divorce.

(v) *Existing marriage*.—It is also hardly necessary to point out, that if either party to an ostensible marriage is already bound by an existing and valid marriage tie, the second so-called marriage will be absolutely void, whether the parties were aware of the existing tie or not. Indeed, as we have seen, the mere celebration of such a second marriage will amount to the crime of bigamy in the party cognizant of the facts. But the previous marriage must be a really binding marriage to nullify the

later. Thus, if a man goes through the ceremony of marriage with his niece, and then marries a stranger in blood, the latter marriage will be valid, the former being no marriage at all. But, as has been indicated, a marriage nullifiable on the ground of physical impotence remains a binding legal marriage until the decree absolute of nullity has been pronounced.

(b) A decree of divorce is a modern remedy introduced by the Matrimonial Causes Act of 1857, when the jurisdiction in marriage affairs was taken over by the King's Court. The Church Court's decree of divorce was only '*a mensa et thoro*,' not '*a vinculo matrimonii*'; and it corresponded with the modern decree of 'judicial separation,' later to be explained. The conditions on which a decree of divorce, i.e. dissolution of legally valid marriage, will be pronounced, are, therefore, purely statutory; and they have been subjected, since 1857, to a good deal of alteration, which has left the law in a somewhat unsatisfactory state.

Broadly speaking, a man can claim a divorce from his wife if she has been guilty of adultery since the celebration of the marriage; and a wife can claim a divorce from her husband, if he has, similarly, been guilty of adultery, rape, or an 'unnatural offence' during the marriage. But the mere adultery of the husband was only made a ground for divorce in 1923; and that statute has no retrospective effect. Consequently, the husband's adultery, if committed during the marriage, but before 18th July, 1923, is not, by itself, a ground of divorce. That, on the accepted view of *ex post facto* legislation, seems reasonable enough.

But, before 1923, though a wife could not get a divorce on the mere adultery of her husband, she could get it on what may be called 'aggravated adultery,' i.e. adultery coupled with incest, bigamy, cruelty, or desertion without reasonable cause for two years. The words, however, of the Act of 1857 which gave her these rights have been repealed by the Act of 1923; so that the wife who now discovers that, before 1923, her husband contracted a

bigamous marriage with another woman, and lived with her in adultery, cannot divorce him on that ground alone. On the other hand, it seems somewhat unjust that a man should not be allowed to divorce a wife who has been found guilty of an 'unnatural offence.'

There is one very striking feature of the decrees of nullity and divorce which demands a special word. They can only be obtained in two stages; and not until the second stage has been reached will they be operative. At the conclusion of the hearing of the petition, if the Court finds the claim proved, it pronounces a 'decree *nisi*,' which is, in effect, merely an intimation that, unless anything unforeseen by the Court occurs, a definitive or 'absolute' decree will be pronounced on application by the petitioner at a later date, usually six months. Meanwhile, the parties, for legal purposes, continue to be married to one another, and, as we have seen, to be guilty of bigamy if they attempt to marry again. And if, during the interval, the Court discovers the existence of any 'bar' to the proceedings which was concealed from it at the trial, it will or may 'quash,' or revoke, the decree *nisi*, and dismiss the petition. A high official of the Crown, the King's Proctor, is specially concerned with investigation into the existence of 'bars,' and is entitled to 'intervene' in the proceedings and inform the Court as to his discoveries, with a view to preventing the decree being made absolute. The difficult subject of 'bars' may be reserved till we have dealt with the third kind of relaxation of the marriage tie, viz.

(c) *Judicial Separation*.—A decree of judicial separation may be granted to a husband or wife on proof of adultery, or cruelty towards the petitioner, or desertion for two years of him or her, or refusal to obey a decree for restitution of conjugal rights, or the commission of an 'unnatural offence,' by the other party, since the commencement of the marriage. A decree of judicial separation does not annul the marriage, but it puts the wife, in respect of subsequently acquired property, in the position of a *feme sole* (including inability to take property 'without anticipa-



tion'), and places her in a similar position with regard to contracts and torts (including the capacity to sue and be sued), while it relieves her husband of all liability for her contracts and torts, including torts committed before the decree was pronounced. This last decision would appear to be somewhat illogical, as also the earlier decision to the effect that, though she remains a married woman, a judicially separated wife cannot acquire property to be held without power of anticipation. A restraint on anticipation imposed during the marriage but prior to the decree, will, however, continue binding till divorce or death of the husband. The parties are not, of course, bound to live with one another during the operation of a decree of judicial separation; and, if they do, the decree ceases to operate.

In addition to the formal decree of judicial separation, the importance of which has been considerably diminished (so far as women's interests are concerned) by the recent legislation on the subject of married women's property, the law knows of two minor forms of relaxation of the matrimonial tie. The one is the power of the magistrates, previously alluded to, under the Summary Jurisdiction (Married Women) Act of 1895, to relieve a woman from the duty of cohabiting with a husband who has been guilty of aggravated assault upon or persistent cruelty towards her, or has deserted her, or neglected to provide reasonable maintenance for her and her children, or one of certain other offences. This is, in effect, the poor wife's decree of judicial separation. A less complete remedy is the 'protection order' which may be granted by a court of summary jurisdiction to a woman whose husband has deserted her without reasonable cause, and who is maintaining herself by her own industry or property. But this order, it will be observed, does not relieve the wife from the duty of living with her husband, if he returns to her; and, since the alteration in the law of married women's property, it has ceased to be an important remedy.

In concluding this chapter, a word must be said on the



important subject of 'bars' to relief from matrimonial bonds.

It is of the essence of matrimonial jurisdiction, that the Court should be in full possession of the material facts of the case, that the conscience of the party seeking relief should be clear, and that application for relief should be *bonâ fide*, and made without unreasonable delay. Consequently, the Court is entitled, and, in some cases, bound, to refuse relief if circumstances inconsistent with any of these conditions appear. There are, therefore, certain 'absolute' and certain 'discretionary' bars to relief. We may take first the absolute bars.

1. *Connivance*.—A party to a marriage who deliberately conspires with the other to contrive that other's adultery, cannot obtain either a divorce or a judicial separation on that ground. Naturally, connivance does not arise in suits for nullity.

2. *Condonation*, or forgiveness of the offence on the ground of which relief is sought. An intolerable state of affairs would exist if, after becoming aware of the other party's offence, the injured party could hold it *in terrorem* over his or her head. He (or she) must, save for unavoidable delay, decide at once whether or not to forgive the offence; and inaction after knowledge will be deemed to be condonation. But condonation is conditional upon future good conduct; and a repetition of the offence will revive the rights of the injured party. Condonation applies equally to divorce and judicial separation. Though there can be no condonation, in the strict sense, of nullity, yet a spouse who 'sleeps upon his rights' will find the Court suspicious of his *bona fides*.

3. *Collusion*.—Any conspiracy between petitioner and respondent to deceive the Court, e.g. by agreeing not to refute untrue charges, the establishment of which is essential to the relief prayed, will be an absolute bar to a decree. Where the charges cannot be truly denied, an agreement between the parties which assumes that the respondent will not put up a defence, is not necessarily collusion; but the Court regards it with suspicion, and

requires the fullest disclosure of all the facts before it will grant a decree.

There remain to be considered the discretionary bars to relief in the matrimonial jurisdiction, i.e. bars which will justify the Court, in the exercise of its discretion, in refusing relief, though they will not compel it to do so.

4. *Adultery*.—Generally speaking, the Court will refuse to grant relief if the petitioner has been guilty of adultery. But, if the fault of the petitioner has been fully and voluntarily disclosed to the Court, the Court may take special circumstances into account and grant the relief, despite the fault of the petitioner. The exercise of this discretion is one of the most difficult of the Court's duties ; and it would be impossible to lay down the exact rules which it follows. For some time it was exercised mainly in favour of women who, deserted or ill-treated by their husbands, yielded to the solicitations of their champions, or were forced by poverty to seek the support of a male protector. Then it was gradually and reluctantly extended to men whose wives had left them without a home, perhaps with no one to look after their children. In exercising its discretion, the Court is considerably influenced by the probability that a release from impossible ties will lead to the formation of new legitimate relationships between the petitioner and his or her accomplice in fault. Curiously enough, while discretion can clearly be exercised in petitions for divorce and nullity, it seems that adultery of the petitioner is, *primâ facie*, an absolute bar to judicial separation. But a condonation of the adultery in such a case by the respondent apparently gives the Court discretion to grant relief to the petitioner.

5. *Conducting*, i.e. to the adultery of the respondent. This must be carefully distinguished from connivance and condonation, as well as collusion, which, as we have seen, are absolute bars. If the conduct of the petitioner, man or woman, has been such as to invite or encourage adultery on the part of his or her spouse, and adultery follows, the petitioner may, and probably will, be refused relief. Thus, a husband who continually used his attractive wife

as a magnet to draw men of loose character to his gambling den, would not be granted a divorce, or even a judicial separation, against her, if, as the result of his conduct, she yielded to the importunities of such men. Conducing towards the respondent's adultery can, naturally, have no part in a suit for nullity.

6. *Cruelty*, and 7. *Desertion or Separation*.—The man who is habitually cruel to his wife, or separates himself from her without just cause, has no right to complain if she lapses from virtue, even if his conduct does not, technically, amount to conducing towards her adultery. Accordingly, the Court is not bound to pronounce a decree of divorce in his favour in such cases; and it is said that, though this rule does not apply to petitions for judicial separation on the ground of adultery, yet, in petitions on other grounds, it will be applied. Naturally these bars have no application to nullity suits.

8. *Delay*.—Finally, though there is no fixed time limit within which applications for relief from marriage ties may be sought, yet the Court looks with the greatest suspicion on stale and belated claims, and will demand an explanation of the delay before it will grant relief. Obvious explanations were (until the passing of recent legislation) the poverty of the petitioner, the difficulty of ascertaining the facts, the absence of material witnesses, and even the desire of the injured party to effect a reconciliation. In other words, the delay, to operate as a bar to relief, must be 'unreasonable.' It applies alike to applications for decrees of nullity, divorce, and judicial separation.

It is, of course, impossible, in a work like the present, to go into the lesser details of the matrimonial jurisdiction, such as the provision ordered by the Court for the maintenance or 'alimony' of an innocent wife, the variation of settlements in favour of innocent parties, the arrangements for the custody and guardianship of the children of the marriage, and many other important points. Generally speaking, the Court has a large discretion in such matters; but it is exercised on traditional lines which deprive it of caprice. We can here deal



only with one important procedural rule which governs matrimonial proceedings based on adultery, and, whatever its origin, is now a dominant feature in proceedings for divorce and separation.

This is the rule that in every petition for a divorce or judicial separation on the ground of adultery, a husband must, and a wife may be ordered by the Court to, make the person with whom the respondent is alleged to have committed the adultery on which the proceedings are based, a co-respondent to the petition. Historically speaking, this provision of the Act of 1857 is the successor of the old action of *crim. con.*, which was a necessary preliminary to a Bill in Parliament for a divorce, in the days when there was no judicial method of dissolving a valid marriage. The intending promoter of the Bill first brought an action for damages against the alleged adulterer for 'criminal conversation' with his spouse. If he succeeded, the judgment in his favour was treated by Parliament as unquestionable proof of the fact of the adultery. Not only was the substance of this practice adopted in the new divorce procedure; but the Act of 1857 expressly provides that a husband may claim damages from the co-respondent, to be assessed by a jury, as in the old *crim. con.* action. But, unlike the older method, the present law does not leave the damages, when recovered, at the disposal of the petitioner, but enables the Court to direct in what manner they shall be disposed of, either in payment of the costs of the proceedings, or as a provision for the maintenance of the guilty wife. Inasmuch as, before 1923, the husband's adultery was not, of itself, ground for a divorce, the Act of 1857 makes no provision for claim for damages by a petitioning wife. There is, however, just a faint shred of authority for saying that she could recover damages in an action against her husband's paramour for loss of *consortium*.



## CHAPTER XXI

### FAMILY LAW (*contd.*): 2. PARENT AND CHILD

By English Law legitimate relationship, i.e. relationship through lawful marriage, is, in substance, alone recognized. Subject to the scanty provision of the Poor Laws for recovering some of the cost of maintenance of an illegitimate child from its putative father, the doctrine that incest and marriage prohibitions include merely natural as well as legitimate relations, and the newly established legal relations between illegitimate children and their mothers, whenever English Law speaks of 'child' or 'children' relatively to their parentage, it means legitimate child or children. Even private legal documents are assumed so to mean, unless their framers indicate otherwise. It becomes, therefore, important to know who are, according to English Law, legitimate children.

Till a very short time ago, this question was easy to answer. For nearly seven hundred years, English Law had held steadily to the view, that a legitimate child was one born in lawful wedlock or within a time after the dissolution of such wedlock which rendered it possible for him to be the actual offspring of both the parties to the wedlock; that every child so born was legitimate, and he only. It is true that, if it could be proved by external evidence, that a child apparently complying with these conditions could not have been actually begotten by his presumed father, then he might be 'bastardized,' i.e. declared illegitimate. But, as we have seen, it was expressly forbidden to either of the presumed parents to take part in this process; and the Courts greatly discouraged any minute and gossiping evidence in such cases. Only when the alleged father had been *extra quattuor maria*, or, at any rate, without means of access to his wife, during the

whole of the period of possible gestation, was the maxim repudiated : *Pater est quem nuptiae demonstrant*.

But a change in the law, which the barons at the Parliament of Merton resolutely turned down in 1235, was at length accepted by the Parliament at Westminster in 1926 ; and the Legitimacy Act of that year compels us to add to our original definition the words, " or where the parents have subsequently married during his lifetime." In other words, the Roman Law doctrine of ' post-legitimation ' has at last been adopted into English Law, but, alas ! in a way which renders a compact definition of legitimacy very difficult. For the marriage of the actual parents of an illegitimate child does not make that child legitimate, if, at the time of his birth, either of such parents was married to some other person. Moreover, the provision of 1926 only applies where the father of the legitimated child was, at the time of the legitimating marriage, domiciled in England or Wales. Again, if the legitimating marriage took place before the passing of the Act (15th December, 1926), the legitimation only dates from that event. And, once more, the rights of succession to property acquired by the legitimation are confined to dispositions made after the legitimation took place ; so that, for example, if the legitimated person's grandfather died before the legitimation, the legitimated person can not take under a bequest in his grandfather's will to the ' children ' of his son, the legitimated person's father, though, if the grandfather died after the legitimation, he could. On the other hand, the mere subsequent marriage of his reputed parents legitimates the illegitimate person, save in the excepted case ; while in most systems legitimation only takes place if the parents desire it. And foreign legitimations are recognized by the Act in some, but not in all cases. Altogether, it is not too much to say, that the provisions of the Legitimacy Act, 1926, do more credit to the hearts than to the heads of their framers.

The year 1926 also witnessed yet another change in the historic policy of English Law with regard to family life. Up to that time ' adoption ' of children, though a familiar

social phenomenon, had no legal meaning. Elderly childless people 'adopted' children, educated them, fed and clothed them, and, quite probably, provided for them by their wills. But all this was purely voluntary. So far as the law was concerned, the adopting parents could, subject to the laws about cruelty to and neglect of children, wash their hands of their 'adopted' child, which, thereupon, reverted to its former position.

This state of things is entirely altered by the Adoption of Children Act, 1926. Apparently what that Act calls '*de facto* adoption,' i.e. the old voluntary adoption above described, may still go on; but, on an application to the Court, a legal 'adoption order' may be made authorizing the applicant or applicants (husband and wife) to adopt a person under the age of twenty-one. Such an adoption will confer upon the adopting parent or parents the legal rights and obligations of natural and lawful parents or guardians in relation to the custody, maintenance, and education of the child, including the right to appoint a guardian to act in the event of his (the adopting parent's) death before the child has attained twenty-one, as well as the right or power to consent or refuse consent to the child's marriage under twenty-one. On the other hand, such adoption gives the adopted person, as such, no right to succeed to the property of his adopting parent on the latter's death intestate, nor even to take under his adopting parent's will or the disposition of any other person, as the 'child' of such adopting parent; nor does it exclude him from such rights in respect of his family of birth. But, of course, the adopting parent will be able to leave the adopted child property by his will, provided he makes his intention quite clear.

The power of the Court to make adoption orders is guarded by somewhat stringent conditions; and the Registrar General of Births, Deaths, and Marriages is to keep an Adopted Children Register, in which such entries are to be made as are directed by adoption orders. It may be noted that the form of the Register does not give the names of the natural parents of the adopted child.



## RESULTS OF RELATIONSHIP

Having now defined the relationship of parent and child for legal purposes, we have to see briefly what it involves. And this may be done by stating shortly the reciprocal duties of parents and children towards one another.

Parents and children are legally bound to contribute to one another's support, if necessary ; but whereas, in the case of contribution by children, this liability is legally limited to the standard of the Poor Law, and can only be enforced by its agency, the liability, at any rate of the father of a child under the age of sixteen, though enforceable through the Poor Law, is, in the case of a father of means, not only socially, but, to some extent at least, legally, extended. Thus, as we have already seen, a man who leaves his wife and children destitute can be treated as a 'rogue and vagabond,' can have orders for their support made against him by the magistrate, can be indirectly made liable for 'necessaries' supplied to his wife in accordance with his means and standing, not only for herself but for their children—and, be it noticed, a man who marries a wife with children, is equally liable for the support of her children by a former husband, and even her illegitimate children. An indirect way in which the Courts will enforce the liability of a father for the maintenance of his child is by refusing, in cases in which the child is entitled to funds in Court, or to trust funds, to make the father an allowance out of the income of the child's own money for its maintenance ; though the Court will be careful, in doing this, not to injure the prospects of the child, or to fetter the discretion of the trustees, or to neglect the wishes of the person from whom the fund is derived.

If the father of a child is dead, the liability for its maintenance falls on its mother, and, ultimately, on its grandparents ; and, even during her husband's lifetime, a married woman having 'separate property' is liable for the maintenance of her child, grandchild, and parents—the two former, however, only in default of her husband.



On the other hand, the law imposes no liability on parents for the contracts or torts of their children, unless, of course, they have authorized or taken part in them. Thus, contrary to general belief, a father is not legally liable for debts, even reasonable debts, incurred by his son or daughter at college or university, unless he has led the tradesmen to believe that he would undertake liability. And, needless to say, parents are under no vicarious liability for the crimes of their children, except as accessories in fact to them; but it is noteworthy that the Children Act of 1908 authorizes, and, in some cases, requires, the Court before whom a child (under fourteen) or 'young person' (between fourteen and sixteen) is charged with any finable offence, to order the parent or guardian to pay the fine, unless it is satisfied that such parent or guardian has not conduced to the commission of the offence by neglecting to exercise due care of the child or young person.

The parent or person having custody of a child between the ages of five and fourteen is liable, as we have seen, if the child fails to comply with the requirements of the Education Acts, to fine and imprisonment.

On the other hand, in spite of certain old statutes and the traditions of the feudal land-law, a parent, as such, has no rights whatever in the property of his child, nor will he, as a rule, be allowed even to handle such property. In nearly all cases, the property of infants is vested in trustees, to whom all such discretionary powers with regard to it, as may be necessary for the advantage of the child, are lodged. But, of course, a father, or, less frequently, a mother, may be made a trustee; and, despite the rule above stated, trustees may, in their discretion, make an allowance to a parent out of the income of his child's property, for the maintenance and education of the child.

#### GUARDIANSHIP

Lastly, there comes the question of guardianship of an infant under twenty-one, whose parents, or one of them,

are or is dead, or have been divorced or judicially separated.

The law on this subject has undergone great changes in recent years. Originally based largely on the patriarchal and feudal theories of the family, it was re-adjusted to modern conditions on the abolition of feudal tenures in 1660, and again, with the increasing recognition of the equality of husbands and wives before the law, in 1886 and 1925. The key-note of the new law is, however, not the traditional rights of the father, or the abstract rights of the mother, but the interest of the child ; and this principle is expressly affirmed by the Act of 1925 as the ' first and paramount consideration ' in all questions coming before the Court relating to the custody, up-bringing, or property of an infant.

Subject to this fundamental principle, an infant's father still remains his sole legal guardian during his (the father's) lifetime ; but this fact, of course, adds little, if anything, to the father's primary position as a parent. On his father's death, the infant's mother becomes, either sole guardian, or guardian jointly with a guardian appointed by the deed or will of the father, or, in default, by the Court. And, even during the father's lifetime, the mother has the same right to apply to the Court in respect of any matter affecting the infant as the father has, and an equal right to appoint by deed or will a guardian to act after her death as co-guardian with her surviving husband, or, if he is dead, the guardian appointed by him. In the event of differences of opinion between the surviving parent and the guardian appointed by the deceased parent, the Court may award sole custody of the infant to either, as it may consider best in the interest of the infant.

By a provision of more than doubtful wisdom in the Act of 1925, the custody of an infant may be awarded to its mother not only where the parties have separated (which would be quite reasonable if the infant were very young or the father had been to blame), but while they are actually living together ; and the father may be compelled to pay the mother a weekly sum for the maintenance of

the infant. By a refinement of stupidity, such an order is not to be enforceable while the parties reside together, and is to cease to have effect if the parties reside together for three months after it has been made. No wonder that the Courts are reluctant to make orders so eminently calculated to produce a rupture in a strained household.

As has been previously remarked, after the pronouncement of any decree in matrimonial proceedings, the Court pronouncing it may make any order it may deem right for the custody, maintenance and education of the infant children of the parties ; and, when a marriage has been dissolved or a decree for judicial separation has been pronounced, the Court may declare the guilty party unfit to have the custody or guardianship of the children of the marriage.

Guardians inherit substantially the position of a father in regard to the custody, maintenance, education, and up-bringing of their wards, including the power to consent to the ward's marriage ; except, of course, that a guardian, as such, incurs no personal liability for the maintenance and support of his ward. Guardianship ends when the ward attains twenty-one. The office of guardian is honorary ; but no one other than a parent can be compelled to accept it.

The position of parent and guardian can, of course, not be alienated ; though the exercise of certain rights may be delegated, e.g. to schoolmasters. But if parents deliberately transfer the care of a child to a person (not necessarily an adopting parent in the legal sense), then, especially if that person is a relative, the Court will not necessarily enforce the rights of such parents to the custody of their child, if they desire to recover it. The Court will be guided largely by a consideration of the child's interests.



## CHAPTER XXII

### FAMILY LAW (*contd.*): 3. SUCCESSION ON INTESTACY

IN so far as a person dies without having effectively disposed of the beneficial interest in all his property, his undisposed-of property is distributed among his surviving relatives according to the Law of Intestate Succession, now chiefly to be found in the Administration of Estates Act, which applies to the property of every person dying after 31st December, 1925. For the present, a great many estates of deceased persons are being administered under the old law which was superseded by the Act just mentioned; but as these will, before very long, have been distributed, it seems unnecessary, in a work like the present, to enter into a description of the old law, though occasional reference to it will be made.

Before setting out the rules of succession laid down by the Act of 1925, it will be well, however, to draw the attention of the lay reader to one or two preliminary points of importance, which are apt to be overlooked.

In the first place, it must not be supposed, that the rules of intestate succession apply only in cases in which a person has died without leaving any will at all. Such cases are not infrequent; for many casual or superstitious people put off making their wills till too late, and others are cut off by unexpected death before making their wills. Further, though every well-drawn will contains a 'residuary disposition' clause, by virtue of which all the property of the testator not effectively disposed of otherwise is provided for, yet the persons in whose favour this residuary disposition is made, or one or more of them, may die in the testator's lifetime, and there may thus be a partial intestacy as to his share, by 'lapse,' as it is called. And, of course, the residuary clause may by accident be omitted,



or be badly drawn, or may specifically exclude certain items ; in all of which cases, there will be a partial intestacy, as to which the rules of intestate succession will apply.

In the second place, it must, of course, be understood, that the only part of a deceased testator's property (with one curious exception) to which these rules can apply, is that which remains after the deceased's funeral and administration expenses, and the debts incurred by him in his lifetime, have been paid out of what are called his 'assets.' At one time, a testator by his will could somewhat seriously affect the rights of his creditors in respect of his assets ; and, to a limited extent (as we shall see later), he can do so still. In the case of a total intestacy, this is, of course, impossible ; but, oddly enough, the fact that a person dies wholly or partially intestate may deprive his creditors of certain advantages in two cases. One is where the deceased was the owner of an 'entailed interest' (to be explained in a subsequent chapter). If he dies intestate as to it—i.e., without expressly disposing of it by his will, it will not go to his creditors for payment of his debts, but to the 'heir in tail.' The other is where the deceased person had a 'general,' i.e. unfettered, power to appoint by his will a fund not actually vested in him, to whomsoever he pleased. If such a person makes a will containing a clause which is deemed sufficient to exercise this power (and such a clause is readily implied), then the fund will become 'assets' for the benefit of his creditors. If, however, he dies without having exercised his power by a will, then the fund cannot be touched by his creditors. This may be hard doctrine for the creditors ; but it is undoubted law.

In the third place, it must be understood, that persons claiming under intestacy have no right whatever, as such, to meddle with the affairs of the deceased person. The administration of such affairs is, in all cases, in the hands of a 'personal representative,' as he is called, supervised if necessary by the Court. Where the deceased has made a will, such person may (but not necessarily will) be an 'executor,' i.e. a person who executes, but, of course,

subject to the rights of creditors, the directions of the deceased's will. But the person nominated by the deceased's will as his executor may die in the testator's lifetime, or may refuse to undertake the executorship, which is a voluntary office. In such a case, even though there is a valid will, and in all cases of total intestacy, there will be an 'administrator' (usually one of the deceased's relatives) appointed by the Court to wind-up the deceased's affairs—collect his 'assets,' pay his debts, and distribute the surplus in manner directed by the will or the rules of intestacy, as the case may be. And any person, creditor or beneficiary, who attempts to 'help himself,' will run very serious risks indeed. Evidently, this is a common-sense precaution to prevent the confusion which would ensue, if claimants were allowed to scramble for priority.

Where there is a will, an official copy of it, sealed with the seal of the Court and accompanied by a brief authority, or 'grant,' from the Court to the executor or administrator, known as the 'probate,' is the official authority to the executor or administrator to act. When there is no will, letters of administration are granted to the relative, or, if necessary, a creditor of the deceased, chosen by the Court, according to fixed principles, to administer the estate. If an administrator dies before completing his task, an administrator *de bonis non* (*administratis*) may be appointed to complete the task; but an executor who dies hands on his task to *his* executor, if he has one. If the original executor dies without leaving an executor, his administrator does not take over the executorship; but an administrator *de bonis non* to the original deceased is appointed.

In the fourth and last place, we should remember that, until the taking effect of the Administration of Estates Act, 1925, it was a striking feature of English Law, that there were two lines of intestate succession, one affecting what was (and still is) called 'real estate,' i.e. freeholds of inheritance, and the other affecting 'personal estate,' i.e. all other kinds of property, including leasehold interests in land, except those, such as copyhold, which were in-

herited according to the rules of local custom. The persons succeeding under the first line were called 'heirs'; and the Law of Inheritance, as it was called, will still regulate the descent of entailed interests not expressly disposed of by the deceased's will, as well as the taking under dispositions in settlements to 'heirs,' and, of course, the descent of freeholds of inheritance left by intestates who have died before 1926. The persons succeeding under the second line were called 'next-of-kin'; and the rules under which they succeeded (known as the 'rules of distribution') were to a large extent taken from Roman Law, as modified by the Statutes of Distribution of the seventeenth century. These rules of distribution have now wholly disappeared, except, again, as to the estates of intestates dying before 1926, and as to the ascertainment of persons to benefit under gifts to persons 'entitled under the Statute of Distributions,' or the like, contained in instruments taking effect before 1926. It may, however, be inferred from the language of the Act of 1925, that 'next-of-kin' will be the appropriate description of persons entitled to take by intestate succession under that Act.

With these preliminary observations, we may proceed to set out the rules of intestate succession applicable to all kinds of property undisposed of by the will of the deceased, other than entailed interests, just pointing out, however, that the otherwise complete assimilation, in respect of succession, of all the deceased's property, is modified by the new category of 'personal chattels' created by the Act, to which, as will appear, the surviving spouse of a deceased person has a preferential claim. These 'personal chattels' apparently include all the domestic (but not the business) 'furniture,' in the broader sense, of the deceased—in house, garden, stable, and garage, consumable and non-consumable, from pictures and motors to dusters and brooms. The term 'personal chattels' can hardly be described as happily chosen. For the term 'chattels personal' has, for centuries, been a familiar term with a much more comprehensive meaning



in English Law ; and confusion is almost bound to result from the similarity of the two terms, for the new term will, almost certainly, creep into home-made wills, and testators will be giving away one thing when they mean another. However, let us state the rules, in the order of claim.

1. *Surviving spouse*.—The first claim on the undisposed of property of the deceased is that of the surviving husband or wife. This has been a principle of English Law for centuries, under the names of ‘curtesy’ and ‘dower,’ which, however, applied only to real estate. These rights are now completely abolished in cases to which the new Act applies ; and the surviving spouse gets (i) the ‘personal chattels’ of the deceased, as explained above, (ii) a clear sum of one thousand pounds, free of death duties and costs, and (iii) a life interest in the whole of the residue of the deceased’s property if the deceased left no issue surviving, or, if, and so long as, such issue survive, a life interest in one half of such residue. Needless to say, the deceased’s property may not be equal to meeting any of these claims ; for it may have been entirely absorbed by the payment of debts and testamentary expenses. And it is assumed that the words “free of death duties and costs,” appearing in the Act as applied to head (ii) of the surviving spouse’s claim, do not give him or her a power to deprive the Crown of death duties, or the personal representative of his costs.

2. *Issue*.—By ‘issue’ is meant the lineal descendants of the deceased person *ad infinitum* living at his decease—children, grandchildren, great-grandchildren, and so on. As was pointed out in the last chapter, it has been a fundamental rule of English Law from the earliest times, that succession by relationship means legitimate relationship alone. But, by a revolutionary step which is justified by considerations of humanity, the Legitimacy Act of the year 1926 provides that, in the event of a woman, who has given birth to an illegitimate child, dying after the year 1926, such illegitimate child, or, if he has died in his mother’s lifetime, his issue, may, if the woman left no legitimate issue surviving her, succeed to the property



of the deceased woman in the same way as legitimate issue. It will be carefully noted, however, that if, for example, a woman leaves a legitimate child, and this child dies in his mother's lifetime leaving an illegitimate child, such illegitimate child will have no right to succeed to its grandmother's property.

Subject to the claims of the surviving spouse, above stated, the whole of the property of the deceased (other than his entailed interests) go to the issue of the deceased absolutely. The principle is, therefore, very simple ; but the rules for the application of it are minutely explained by the Administration of Estates Act, 1926, and must be stated with some care.

There is no preference of age or sex recognized by the Act. On the other hand, the principle of succession *per stirpes*, as opposed to succession *per capita*, is adopted. Thus, if A had three children, one of whom died in his lifetime leaving five children, then A's property, if he dies intestate, will be divided into three equal parts, of which each of his surviving children will get one, while the third will be divided equally among the five children of the deceased child of A. And the same principle would be applied if all of A's children had died in his lifetime—i.e. no matter how many children each deceased child left, such children would only get their deceased's parent's share. If, however, one of A's children had died in A's lifetime leaving no issue who survived A (a child conceived but not born being reckoned for this purpose as surviving), such deceased child's share would drop out altogether, and A's property be divided into halves.

Moreover, the Act is very careful to provide that the share of none of the issue shall 'vest,' i.e. become indefeasible, till he or she attains twenty-one or marries. In the event of such a person dying before twenty-one unmarried, his or her share goes to swell that of his surviving brothers and sisters, or, if there are none, that of the other stocks of descent, or even, if he is the last survivor, that of the widow or widower of the deceased. But, when one of the issue attains twenty-one or marries, his

share becomes 'absolute,' i.e. can be spent or willed away by him; and his children have no legal claim upon it. But, even while the share of a child or other issue is defeasible, i.e. while he is under twenty-one and unmarried, the trustees in whom the property is vested may 'advance' out of his share, or the income of his share, such sufficient sums as may be necessary for his maintenance and education; and, if he attains twenty-one or marries, he will get the accumulations of the income of his share.

These somewhat elaborate arrangements are described in the Administration of Estates Act, 1926, as 'the statutory trusts'; and, as we shall see, the same arrangements are applied to other groups of successors on intestacy, with one important difference.

This important difference is, that, when the property of the deceased is distributed among his issue, the principle of 'hotch-potch,' as it is familiarly called, is applied, namely, that if the deceased person has in his lifetime advanced a sum or sums of money to any child, either to settle him or her in life, or to provide a marriage portion, that sum or sums shall be taken into account as part of the share of such child, or his issue if he predeceases the intestate. The way in which this principle is carried out is by adding the sums advanced to the actual value of the deceased's property, and then deducting from the share of each child the amounts advanced to him by the intestate. Formerly the principle of 'hotch-potch,' which is quite ancient, only applied to advances by a father; now, apparently, it applies to advances by a mother also. It does not, however, apply to advances by deceased persons to their grandchildren or remoter issue,

3. *Parents*.—If the deceased leaves no issue, or if all the issue of the deceased die without attaining a vested interest in his property, then, subject always to the claims of the deceased's surviving spouse, the property goes equally to the father and mother of the deceased, or if only one of them survives the deceased, then wholly to that one—in each case absolutely. The mother of an illegitimate person alone succeeds to him or her.

4. *Other relatives*.—The more distant relatives of the intestate are ranged into five groups; and no one of a later group can take anything until the whole of the earlier groups have been proved to be extinct at the intestate's death. These groups may claim (but always subject to the rights of the deceased's surviving spouse) in the following order:

(i) *brothers and sisters of the whole blood*, equally, *per stirpes*, subject to the statutory trusts (except as to 'hotch-potch').

(ii) *brothers and sisters of the half blood* to the deceased, similarly.

(iii) *grandparents*, equally and absolutely.

(iv) *uncles and aunts of the whole blood*, equally, *per stirpes*, subject to the statutory trusts (except as to 'hotch-potch').

(v) *uncles and aunts of the half blood*, similarly.

If there is a failure of all these possible claimants, then the whole of the intestate's property (capital and income) goes to his or her surviving spouse; but if there should also be no surviving spouse, then to the Crown as *bona vacantia*.

## CHAPTER XXIII

### THE LAW OF PROPERTY : GENERAL PRINCIPLES

By 'property' is meant, as the name implies, the result of the appropriation, or making 'proper' to one's-self, of some part of the resources of the universe. All individual property is, therefore, a form of monopoly ; though it does not necessarily follow that it is therefore a bad thing.

One hears and reads the expression 'natural rights of property' ; and the phrase has a genuine, though often misunderstood, meaning. It is intended to signify that the instincts and traditions of the ordinary man justify him to himself, and, it may be, to his fellow-men, in appropriating to himself, in certain circumstances, certain parts of the resources of the universe. If these views are shared by the other members of his community, or the more influential part of them, the community will probably lend its assistance to protecting these appropriations, most probably by enforcing laws or rules imposing penalties, or, at least compensatory liability, on those who interfere with them. At the very least, it will justify and protect the claimant who uses lawful efforts to secure or obtain them. Thus property becomes a legal institution, and is, in fact, found as an important chapter of the law in the codes of all civilized nations. With the moral or philosophical justification for the existence of such an institution, we are not here concerned, nor with its origin, interesting as that is. We accept it as a recognized fact of modern law, and in particular of English Law. As we have already seen, it is protected to a certain extent by the Criminal Law, e.g. in the rules about theft, malicious injuries, forcible entry on land, and the like. Here we deal with it as an institution of the Civil Law.



The above brief account of the nature of property was necessary to enable the reader to avoid a confusion which has disfigured many learned treatises and many Acts of Parliament, to say nothing of Parliamentary debates and other discussions. This is the confusion between property and the subject-matter of property. Both topics are important ; but it is fatal to clear thinking to confuse the two. The so-called ' defining sections ' of Acts of Parliament are some of the worst offenders in this particular, and merely leave the reader more puzzled than before.

Property, or proprietary rights is, or are, as we have seen, creatures of the law. They have no tangible existence, but are powers conferred upon the holder of bringing the support of the community, through the Law Courts, to bear against all persons who interfere with the interests which they protect. These persons are said to be under duties, corresponding to these rights or powers ; and thus the Law of Property resolves itself into an account of the rights and duties of the citizen with regard to the appropriation of natural resources.

Observe that it has been said that proprietary rights are valid and enforceable against ' all persons.' This is the decisive mark which distinguishes them from the remaining class of rights to be dealt with in this book, viz. Obligations, or rights which are only enforceable against specific persons, by reason of their entering into contracts or committing torts. The ordinary member of the community has to observe or respect proprietary rights, not because he has promised to do so, or because he has been guilty of a wrong, but simply because the law, in the general interest of the community, has said that he must. This distinction the Roman jurists express by saying that proprietary rights are *jura in rem*, while rights arising from obligations are *jura in personam*. Continental legal language, less satisfactorily, distinguishes them as ' objective ' and ' subjective ' respectively.

But not all rights *in rem* are proprietary rights. For example, many of the public rights belonging to the citizen, such as freedom of speech and association,

described in an earlier part of this book, and many of the private rights, such as the right to one's good name, to immunity from assault or false imprisonment, and the like, which have to be dealt with hereafter, are not proprietary rights, though they are enforceable against all members of the community. It is sometimes attempted to claim them as such, on the plea that they protect a man's 'property' in his person, reputation, and freedom; but this is really playing with words. True proprietary rights have always a subject-matter of an alienable character, acquired by the proprietor through some recognized legal 'title,' such as purchase, inheritance, bequest, exchange, and the like; not by the mere circumstance of being a member of the community. It is the fact (and this, perhaps, is the source of the confusion) that some true proprietary rights have no *tangible* subject-matter, i.e., no physical substance with which they are immediately concerned, and over which they are exercised; as, for example, patent rights and copyright, and all those interests which English Law calls 'things-in-action,' of which it will be necessary to say something later on. But, to a very great extent, proprietary rights are concerned with such objects as land, buildings, mines, furniture, clothes, pictures, carriages, and all the innumerable articles of commerce; and, as a matter of fact, the subdivisions of the Law of Property are largely classifications of the subject-matter of proprietary rights. And it is just this fact that has led to the deplorable confusion which was referred to at the beginning of this chapter.

Thus, for example, when a legal document speaks of 'land,' it is often impossible to tell whether it means the soil or physical substances of which land is composed, or of a particular interest or 'estate' in land; and the same is true of the word 'estate' also. There is, no doubt, some excuse for this confusion, in the fact that the nature of the interests recognized by law are determined, to a large extent, by the nature of their subject-matter. But still, the confusion is a source of great error; and, to avoid it, we shall make our primary division

by the subject-matters of property, and reserve the consideration of the interests recognized by the Laws of Property in such subject-matters, and the modes of acquiring and losing them, for a secondary or sub-division.

The first great division of the Law of Property, then, is into (ii) the Law of Property in Land, or Immovables, and (i) the Law of Property in Chattels, or Movables. It stands to reason that, owing to fundamental differences in the nature of land and chattels, the nature of the interests recognized by law in them, and their methods of acquisition and alienation, are radically different. A piece of land cannot rise up and run away, or be carried off, or disappear, or die ; while a horse or a sheep can do all these things. A piece of land has, therefore, a permanency which enables successive interests (possibly extending over a long period) to be created and preserved over it, whilst it would be ridiculous to grant a lease, say of a sheep, for 99 or even 21 years.

Unfortunately, though English Property Law started with this simple primary division into land and chattels, or immovables and movables, the simple division became blurred by the refusal of the feudal land-law to recognize more than a limited class of interests in land as worthy of the valuable remedies known as 'real actions,' previously described. However valuable a term of years, or leasehold estate, the feudal lawyers declined, for nearly three centuries, to recognize it as 'real property,' i.e. property recoverable by a 'real action.' They persisted in classing it as an interest for the protection of which only a remedy in damages could be given by a personal action. Thus it became classed as a chattel, or 'personal property'; though its essential character caused it to be known by the hybrid name of 'chattel real.' Even when at last, under cover of elaborate fictions, a leasehold estate became practically recoverable *in specie* by the action of Ejectment, it retained its old character of 'personal property' for many purposes, including that of passing to the personal representative for distribution among next-of-kin or legatees on its owner's death, instead of going to his heir



or devisee. This famous classification into 'real' and 'personal' property is, perhaps, the most conspicuous instance of a confusion between property and the subject-matter of property; and it has left its mark on even the most modern English Law language, in such abominable expressions as 'freehold land' (meaning 'freehold interests in land') which disfigure quite recent Acts of Parliament.

Happily, one of the best results of the great changes in the Law of Property which have recently taken place, and which date only from the year 1926, has been to do away very largely with the feudal classification of property into 'real' and 'personal,' and to restore the old simpler and more logical classification into property in land (or immovables) and property in chattels (or movables). In our necessarily brief treatment of the Law of Property we shall deal first with the law affecting immovables, describing the interests in land which are recognized by the law, then apply a similar treatment to the law affecting movables, or chattels, then deal with the important subject of the alienation of property by transaction *inter vivos* or by will, finally saying a few words on that most peculiar and characteristic feature of English Property Law, the Trust, or fiduciary interest.

#### LAND AS THE SUBJECT OF PROPERTY

A preliminary warning of great importance to students of Land Law is, that land is regarded by English Law as capable of being divided, not merely vertically, as into Whiteacre and Blackacre, side by side, but horizontally, into surface and subsoil, and, to some extent, even above the surface, into strata of air. And this though there may be no physical severance of any kind to mark the division. By this statement it is not meant that several persons may be interested in the same piece of land in undivided or co-ownership; that is a matter now of little importance, though of great historical interest. What is



meant is, that A may be the sole owner of the surface of Blackacre, B the sole owner of one stratum of the subsoil, C of a lower one, and so on, *ad infinitum*, and that each share will rank as a separate tenement or holding. Such a severance occurs, in fact, whenever a lease merely of the surface of land is granted, as, for example, the ordinary farming lease. Here the landlord retains the subsoil, but parts with the possession of the surface, it may be for a long period of years. And, of course, a similar but converse result is reached by the grant of a mining lease. The law, however, starts with the assumption that the owner of a freehold interest (to be hereafter described) is owner of that interest *usque ad centrum et usque ad coelum*—i.e. down to the centre of the earth and up to the sky. Consequently, a man who hangs out a flag over his neighbour's boundary is, *primâ facie*, guilty of trespass, though he does not touch his neighbour's surface. And, when aviation became an established fact, it was necessary to provide, by the Air Navigation Act, that mere flight over A's land, "at a height above the ground, which having regard to wind, weather, and all the circumstances of the case, is reasonable," should not, of itself, constitute trespass or nuisance.

The first sub-division of interests in land recognized by English Law is into the classes known respectively as 'corporeal' and 'incorporeal' hereditaments. The term 'hereditament,' originally meaning that which is capable of being inherited, has long been used to signify all interests in land, whether capable of being inherited or not; and it seems that, notwithstanding recent changes in the law, it will continue to be so used. A 'corporeal hereditament' is an interest which confers upon its owner the possession of the land itself, or, at least, the right to receive rent from a leasehold tenant; an 'incorporeal hereditament' is one which does neither. Thus, for example, an ordinary landlord of a house let to a tenant for a term of years has a corporeal hereditament, and so, by modern law (though quite inconsistently with feudal theory) has the tenant. But a person who has only a right of way over Blackacre

has not a 'corporeal,' but an 'incorporeal' hereditament; for he can never claim possession of the land nor its rents and profits. Midway between the two classes stand 'equitable interests,' of which we shall later speak, and which were, of course, wholly unrecognized by feudal land-law. Whether these can be fitted into the classification since the recent changes in Land Law, seems doubtful. And, indeed, the importance of the distinction between corporeal and incorporeal hereditaments seems to have been considerably diminished by these changes. Still, as some differences will remain, and as the expressions 'corporeal hereditament' and 'incorporeal hereditament' occur frequently in legal literature, it has been thought convenient to explain them.

Moreover, the subject provides a good opportunity for alluding to another famous distinction, which has certainly not been abolished by the recent changes, and which runs through the Law of Property. This is the distinction between *ownership* and *possession*; the latter a term which has already been used in this chapter. Both ownership and possession are clearly recognized by English Law; and, fortunately, English Law has, in contrast with other systems, a comparatively simple theory of possession. It takes the view, that whenever a person has *de facto* control over a material object, in such a way that he can, for the time being, regulate the uses to which it shall be put, then that person has possession of it. Possession is, therefore, matter of fact, not of law; but it does not follow, on that account, that there is not a mental element in it. As a famous judge once observed, "the state of a man's mind is as much a matter of fact as the state of his digestion." Thus, for example, for the doctrine applies equally to movables and immovables, if a friend has asked me to 'mind' his bicycle for a few minutes while he goes into a shop, I am not a possessor of the bicycle; because I have no desire or intention to control its use. My part is, merely, to defend my friend's control. So also, if a servant is put in charge of his master's horses or furniture or house, he is not considered to have possession of them; for he is,

presumably, merely his master's hand or arm to defend his (the master's) control of the object.

On the other hand, there need be no physical contact between the possessor and the object possessed. Thus, in the cases last put, my friend or the servant's master, not I or the servant, is in possession of the bicycle, horses, furniture, or house ; because the former can exercise actual control whenever they like. Or again, I may have possession of goods in a warehouse fifty miles off, if I have the key and can alone get at them. This is often called 'constructive possession.' But that is a most unhappy phrase ; for it suggests that it is something different from actual possession, which is not the case. A much better phrase is possession *longi manu*, 'with the long hand.' From these examples, it will be perceived that a certain mental element is essential to possession, though what exactly it is, is difficult to say. It cannot be knowledge ; for a man may be in possession of an article buried in land which he occupies, though he had not the faintest notion of it being there. And it is quite clear, that a man may be in possession of an object to which he has no shadow of rightful claim ; though here, of course, his possession will be wrongful, or, as the law calls it, 'tortious.' But the law, for the sake of peace and order, may protect possession which is admittedly wrongful.

As we have seen, even if a person lawfully entitled to possession of land forcibly ejects the most clearly wrongful possessor, he commits a criminal offence. And the law always presumes the possessor of an object to be its owner until the contrary appears. Indeed, in the earlier days of English Law, that law was so intent on protecting the possessor, and gave him so many remedies, that the owner (if he were not also possessor) found himself pretty much out in the cold. It was this fact, doubtless, which gave rise to the saying that "possession is nine points of the law."

Ownership, on the other hand, is essentially a matter of law. All kinds of property consisting of rights (with corresponding duties), created by the law, it follows,



naturally, that the law is very careful to determine in whom those rights shall vest. The rules by which this determination is effected are called 'titles' to property; and we shall deal with them later on. Therefore, the expression 'unlawful owner' is a contradiction in terms; and the expressions 'lawful owner' or 'true owner,' or 'rightful owner,' though harmless in themselves, are really sources of danger, because they suggest the fallacy, that some kinds of ownership are unlawful. One is very tempted to use them in such cases as that in which a man has had his watch stolen, and it has been sold in open market to an honest purchaser. In that case, contrary to the general rule, the purchaser becomes owner; and the man who was robbed cannot get his watch back until the thief has been caught and convicted. Till then he is not an owner at all; though he may fairly be described as the 'former owner.'

Finally, we must be very careful to distinguish between three perfectly different though related expressions, viz., 'possession,' the 'right to possess,' and the 'rights of the possessor (or possession).' The first is the relationship between a person and a physical object which has been described above, and which, as has been said, is a pure state of fact, and may be lawful or unlawful. The second is the power enforced by law, to obtain possession by all lawful means; and it is very important for practical purposes. Like all rights, it is matter of law. So also is the third, the 'rights of possession,' which are the powers conferred by law on possessors, merely as such, to defend their possessions. As we have said, these are numerous and important; for the law dislikes disturbance of possession.



## CHAPTER XXIV

### LEGAL AND EQUITABLE INTERESTS IN LAND

WE come now to what is, at the present day, the most important of all the sub-divisions into which Land Law falls, viz., the distinction between legal estates and interests on the one hand, and equitable interests on the other. And this distinction is the more interesting, as it marks the culmination of a movement, set on foot no less than eight centuries ago, to achieve certain objects in circumstances wholly different from those of the present day, and yet subsequently adapted, owing to the marvellous flexibility of English Law, to modern and entirely changed conditions.

We have before hinted, that, during what may be called the feudal epoch, viz., from the Norman Conquest to the Wars of the Roses, what really interested the King's lawyers and Courts about land was, not its economic but its political importance. Briefly put, the levy of the professional army, and the liability to serve the King in camp and council, were based upon the possession of land by feudal tenure, or, as it was called, the 'seisin' of the land of England. It was primarily to serve this interest of the King that the great Domesday survey was drawn up, and the 'real actions' invented. No doubt the feudal vassal looked upon his fief not merely as a means of rendering military and other service; he was interested in it as a source of revenue for the maintenance of himself and his family. But these matters did not interest the King's Courts of Common Law; their doctrines and their practice were concerned only with settling the all-important question: who was rightly seised, or possessed, of Blackacre; in order that the Exchequer might from him extract the service and dues for which Blackacre was

assessed in Domesday Book. All other questions they ignored.

But there were other persons who were far more interested in the economic than in the political aspect of landowning. Among these were certain 'poor brethren' of the new Mendicant Orders of the Church, who appeared in England in the thirteenth century, and desired land on which to build churches, hospitals, and schools. Now they were in a difficulty, or, rather, in several difficulties. They were, for one thing, sworn by their holy vows to poverty; and poverty was hardly consistent with landownership. They were not soldiers, at least of any earthly commander; and landownership, at any rate of the feudal kind, involved service in the army. Moreover, there were beginning to be certain mutterings in the King's Council about lands getting into 'mortmain,' i.e. into the hands of religious houses. So the Friars had to walk warily; and, in their various attempts to solve their difficulties, they hit upon the device of getting lands transferred to, or held by, lay persons of the ordinary landowning type, to the 'use' or 'need' (*opus*) of their work. The idea spread with rapidity; and, by the end of the thirteenth century, we get a statute of the new Parliament relating the many evils which had arisen from the practice of 'putting lands to uses,' which had been taken up by all kinds of persons, and employed for nefarious purposes—principally to escape payment of the oppressive feudal dues, and the discharge of honest debts.

For the point was, that, at the time when this statute was passed, there was no Court which recognized the existence of the *cestui que use* or beneficiary under the use, or the interest which he undoubtedly had in the land. To the Common Law Courts, these things were outside the picture. All they were concerned about was, as has been said, to know who was seised of (i.e. seated on) the land.

But this state of things cut both ways. On the one hand, it prevented the creditor of the *cestui que use*, or beneficiary, getting at his lands, and his lord exacting feudal dues on his death; because, in the view of the Common Law

Courts, the beneficiary *had* no lands. On the other hand, if the feudal tenant, the person 'seised' of the land, declined to perform his use or trust, the beneficiary really had no lands, i.e. got no benefit out of the use or trust.

Probably, for a time, the pressure which the Church Courts could bring to bear on such an enormous scandal as a breach of trust (perhaps guaranteed by an oath) in favour of religious objects, was sufficient to prevent serious breaches of trust. But when the practice of 'putting lands to use' was extended to purely family arrangements, then there was obviously need for some better protection—the more so as the King's Courts were evincing an increasing jealousy of allowing the Church Courts to meddle in matters concerning land. Any way, by the end of the fourteenth century, we find the Chancellor, in his Court of Equity, enforcing trusts or uses, not only of land but of chattels, and rapidly developing a new kind of ownership, 'equitable ownership,' which, though ignored by the Common Law Courts, was vigorously protected by the growing power of Chancery.

Indeed, the new idea was later applied, not only to beneficiaries under uses, but to the borrower's right (or 'equity') of 'redemption' in the land or chattels which he had conveyed to the mortgagee or creditor, but which Equity regarded as still his (the borrower's) property subject to repayment of the mortgage debt, and even to the interest of the purchaser who had paid his purchase-money but had not yet received a formal transfer of his land. In other words, whenever the Chancellor thought that, but for the technicalities of the Common Law, A was really owner of land or chattels, he would do his best to enforce A's rights as such owner, even against B, who was owner by common law rules; provided only that he could find some flaw in B's conduct, which would prevent him, conscientiously, holding the lands or chattels against A. But this was an important proviso, and clearly set equitable ownership on a lower level of security than legal ownership; for there was always the danger lest the legal ownership should get into the hands of a '*bonâ*



*fide* purchaser without notice'—i.e. a person who acquired the land or chattels with a clear conscience, and for value given.

In other words, the rights of the equitable owner were not strictly *in rem*, i.e. against all persons. But they were, on the other hand, proprietary, or at least quasi-proprietary rights; because they would be protected against all the world except the legal owner whose conscience was clear, and they could be alienated and developed, just like ordinary property. At first, the equitable owner had no legal rights at all—i.e. rights which the Common Law Courts would recognize; gradually he acquired almost all legal rights, except the very important right to possession of the subject-matter, and except always rights against the '*bonâ fide* purchase for value without notice.'

Although the system of 'dual ownership' thus set up was undoubtedly popular with certain classes, it can hardly be doubted, also, that it was attended by considerable evils. These evils are set out, perhaps with more plausibility than honesty, in the preamble to the Statute of Uses, passed in the year 1535, ostensibly to abolish the system, so far as interests in land were concerned. But if the abolition of the dual system of ownership was really the object of the framers of that statute, they entirely failed to accomplish it, for reasons too technical to be explained here. What they did do, with disastrous effect, was to introduce the laxities and complexities of equitable ownership into dealings with legal estates, and thus to prepare the way for that complicated system of family settlements which became almost universal among the landowning gentry during the Civil War. The chief aim of such settlements was to break up the ownership of the family estate into so many temporary interests, and to load it with so many charges, that it could never be seized or forfeited entirely for political delinquency, because no delinquent had more than a limited interest in it. Meanwhile, under the name of 'trusts,' the old equitable ownership went on with scarcely



a break ; though the formal abolition of feudal tenures during the Commonwealth period deprived it of its original justification.

The new system of settlements, instead of passing away with the Civil War which gave rise to it, seems actually to have increased in intensity during the eighteenth and early nineteenth centuries, the hey-day of the landowner. Whatever its advantages, the evils which it produced were very great. Not only did it largely succeed, owing to the fact that it required all the persons interested in the settlement to agree to a sale, in keeping land out of the market ; but, even where sales were effected, the purchasers were liable, though acting in all good faith, to lose the benefit of their purchases, either through the subsequent discovery of some legal estate ' outstanding ' (i.e. vested) in a remote trustee who was dead or could not be found, or by the appearance of some secret interest the existence of which the legal advisers of the purchasers had failed to discover. So strong was the feeling against the system in Reform days, that the abolition of the legal estate, and the assimilation of all proprietary interests to equitable ownership, became the avowed object of a powerful school of reformers. Fortunately, the country was not carried away by their enthusiasm ; for it at length began to be realized by cool thinkers, that the distinction between legal and equitable ownership did not rest only on legal conservatism, but was justified by a real social need. For, just as the different interests of the State and the family or religious house in the feudal days had given birth to the distinction between legal (or public) and equitable (or private) ownership, so, in the nineteenth century, the different interests of business dealings and what may be called endowment dealings with land, rendered it essential to retain the distinction. A word on this distinction.

Broadly speaking, when a man buys or leases land, either he desires to use it for residence or for occupation in connection with his business, or as an investment of his savings, or, on the other hand, he buys it to make a provision for his family, for the purpose of ' settling ' it, as

it is called, upon them. In the former case, he seeks, above all things, safety and simplicity of title, which will give him complete security against unknown claims, and avoid expensive investigations. In the latter, he is far more concerned with being able to regulate minutely the devolution and distribution of the proceeds of the property in accordance with the actual or hypothetical needs of the various members of his family (perhaps some yet unborn). To achieve this object, it is, almost invariably, necessary for him to appoint trustees, i.e. persons to whom the care and management of the property must largely be entrusted, leaving only to the beneficiaries the equitable right to insist on the proper administration of the trusts.

It was considerations of this kind which led Parliament to embark, from the middle of the nineteenth century, on a long course of legislation destined to facilitate the sales and leases of settled estates. Put shortly, the aim of these statutes was to enable either the trustees or, by a somewhat later policy, the 'tenants for life,' or other owners of limited interests, to make sales and other dispositions of the whole of the interest in the land included in the settlement (not merely the interests of the parties agreeing to the sale); the equitable rights of the other parties interested being transferred from the interest sold to the purchase money or rent, which would be paid to the trustees or the tenant for life respectively. His money once paid to the trustees or the tenant for life, the purchaser would have no need to worry about the claims of the beneficiaries, who would look to the trustees or the tenant for life for the protection of their interests. From 1856 to 1890 a long series of Settled Land Acts, with ever-increasing efficiency, strove to give effect to this policy, with unquestionably good results.

The legislation of the year 1925 has made a great step forward on the same lines by adopting two additional precautions—first, that of strictly limiting the kind of interests in land which can be created as legal estates or interests, second, by rigidly defining the precautions

which will be sufficient to establish the *bona fides* of a purchaser for value. Both these changes are important. So long as the protection of the legal estate could be given to interests such as life and entailed estates and future interests not yet in possession or even vested in any definite person, so long was the conveyancer's task heavy and his risks great. So long as the purchaser was held to have implied or imputed notice of every equity which the detective instinct of a highly-trained conveyancer might have smelt out, so long was it impossible that conveyancing should be safe or cheap. Let us see now briefly in what condition the new legislation has left the relations between legal estates or interests and equitable interests.

#### LEGAL ESTATES OR INTERESTS IN LAND

'Estates' and 'interests' in land are not synonymous terms. Every estate is an interest; but every interest is not an estate. Only those interests which confer possession of the soil, or at least receipt of rent from a tenant for years, are estates; they correspond, in effect, with the 'corporeal hereditaments' before described. Their importance was due to the fact, that they originally determined the relation of the person holding them to his immediate lord, and so, ultimately, to the Crown. They defined his *status* or estate. With the virtual abolition of the feudal principle of tenure, 'estates' have ceased to have the peculiarly important place they long held among interests in land. Nevertheless, they are sufficiently important to be classed apart by the new legislation, which declares that there can be only two kinds of legal estates, viz. (i) an estate in fee simple absolute in possession, (ii) a term of years absolute.

(i) *Fee simple absolute in possession*.—An estate in fee simple was, by the Common Law, an estate granted by a lord to a vassal to be held in free tenure, and capable of descending to the vassal's heirs *ad infinitum*. When liberty



of alienation of such estates was definitely recognized by the famous statute *Quia Emptores* in 1290, the estate in fee simple became in effect complete ownership, subject only to the chance of it 'escheating' to the lord who granted it (or his successor in title) on the failure of the heirs, lineal and collateral, of a tenant who died 'seised' of it. Before land could be devised by will, that was not such a rare event. After 1540, it became increasingly rare; because a tenant in fee simple, knowing himself to have no blood relatives, would probably make a will and so defeat the escheat.

It being impossible now to impose new services or rents on a fee simple, and the doctrine of escheat having been abolished by the Administration of Estates Act, a fee simple has ceased to be the subject of tenure in anything but name, and may be defined as complete and perpetual ownership of land. It will be observed that, in order that it may exist as a legal estate, a fee simple must be 'absolute' and 'in possession.' Owing to an apparent absence of any attempt to define the somewhat vague word 'absolute' in connection with a fee simple, we are left in some doubt as to the meaning attributed by the Law of Property Act to it. But, reading between the lines of another section, we may gather that a fee simple expressly made to determine on the happening of an uncertain event or contingency would not be a 'fee simple absolute,' and, therefore, could not exist as a legal estate, save in one or two expressly excepted cases. The requirement 'in possession' excludes future interests, but includes receipt of rents and profit from a tenant for years. Therefore, though X, owner in fee simple, has granted a lease for twenty-one years to Y, the occupying tenant, at a rent, X will, nevertheless, be deemed to be 'in possession,' because he will be entitled to receive Y's rent. This is strictly in accordance with feudal principle.

With regard to the powers of an owner in fee simple, there is little to be said. Broadly speaking, he can do what he likes with the land, subject only to the laws existing for the benefit of the community at large, such



as the law against nuisances, and subject to any rights over the land, such as rights of way or pasturage, granted, or assumed to have been granted, by his predecessors in title.

(ii) *A term of years absolute*.—The essence of a term of years is, that it should not be capable of surviving beyond a definite calendar date. As previously explained, an interest held for such a term did not rank, according to feudal principles, as the proper subject of tenure, nor was it regarded as an 'estate.' Owing to changes in the procedure relating to the protection of the tenant for years, however, this point of view changed in the fifteenth century; and 'leasehold tenure' and 'leasehold estate' became recognized expressions. Curiously enough, not only are leaseholds expressly made capable of being legal estates by the Law of Property Act, but they are, in practice, the only instance of true tenure now existing. This is, perhaps, convenient; for the terms 'landlord' and 'tenant,' in relation to leaseholds, are familiar in every one's mouth.

But when we examine the rest of the definition, the result is by no means so satisfactory. In the first place, a term of years 'absolute' evidently means something very different from the 'absolute' of the fee simple described in the immediately preceding line of the Act. For we are expressly told, in the defining section of the Act, that a term of years may well be 'absolute' though it is expressly made liable to determination by "notice, re-entry, operation of law, or by a provision for cesser on redemption, or in any other event," provided only that such event is not the dropping of a life or lives. In the second place, though the well-established doctrine of the Common Law was, that there was no 'estate' in a leasehold interest until the lessee had entered and taken possession, yet in the Law of Property Act there is no requirement of possession for the term of years which may be a legal estate. Further, there may, either for mortgage or other purposes, be any number of leasehold estates in the same land at the same time; though,

presumably, the Court will have to decide, in accordance with established rules, as to their priorities. There would appear to be considerable metaphysical if no practical difficulties in this scheme.

*Primâ facie*, a lease for years confers only a right to use the surface of the land, including buildings and fixtures; but a lease may be granted with the express object of enabling the lessee to build houses which require foundations, or to dig for minerals. Still, subject to express or obvious intention to the contrary, the lessee commits 'waste,' and is liable to an action for damages, if he injures or takes away anything forming part of the substance of the land, as distinct from annual produce, e.g. timber, minerals, fixtures, buildings. To a limited extent, he is also liable for 'permissive' waste, i.e. failure to keep the premises wind-and-water-tight, or departure from or neglect of the usual course of husbandry. But, in almost all written leases, the law of waste is largely superseded by the express covenants of the parties, which have to be carefully observed. Contrary to popular belief, there is no rule of law which says that a lessee who fails to pay his rent or otherwise conform to the terms of his lease, can be ejected by his landlord, except in certain cases of small or deserted houses. But every well-drawn lease contains a 'proviso for re-entry,' to the effect that, should the lessee fail in any of his obligations, the lessor may enter and eject him, peaceably if he can, if not, by an action of Ejectment. Still, even where such a proviso exists, the Court has ample powers to give relief against ejectment (or 'forfeiture' as it is called), on much the same principles as those on which Chancery relieved the mortgagor who failed to redeem his property on the day fixed for repayment. Even an under-tenant may get relief, if his holding has been imperilled by a forfeiture incurred by his immediate landlord to the head landlord. The details of the Law of Landlord and Tenant are, however, far beyond the scope of this book.

In addition to these 'legal estates,' there are several classes of interests in or charges over land which are

capable of existing as 'legal interests.' Of these classes only two need be mentioned.

(iii) *Incorporeal hereditaments*.—We have before mentioned this class of defined and limited rights, exercisable by A, over, or to the detriment of, land in the possession of B. The latter's land is called the 'servient tenement'; and, if A's right is exercised by him by virtue of his occupation of land other than B's, his land is called the 'dominant tenement.' Where the 'incorporeal hereditament' is merely a right of user, like a private right of way, it can, in strict law, *only* be exercised as appurtenant to a dominant tenement; and it is then called an 'easement.' Where it consists of a right of taking part of the soil or its produce it is called a 'profit,' and may then be exercised irrespectively of any 'dominant tenement.' Thus, if I claim a right of way over B's land, I must show that I am entitled to it as owner or occupier of another piece of land. But if I claim a right of fishing in B's water, I can claim it merely as a right attached to my person, by virtue of a grant or agreement. The Law of Property Act does not use the term 'incorporeal hereditament' in the section dealing with the creation of legal interests; but it speaks of 'easements, rights, or privileges in or over land,' and rent charges. And it requires, as in the case of legal estates, that for these rights to be capable of existing as legal interests, they should be owned for an interest equivalent to an estate in fee simple absolute in possession or for a term of years absolute. It would be impossible here to go into the recondite though extremely interesting subject of easements and profits, which involves a good deal of knowledge of old law, and of certain highly technical rules.

(iv) *Charges by way of legal mortgage*.—When we come to deal with the subject of alienation of land, we shall see that the new legislation contemplates the effecting of mortgages by granting terms of years to the mortgagee as security; and such terms may, of course, operate as 'legal estates.' But the Law of Property Act also encourages the giving of a simple charge in lieu of a formal



mortgage; and it provides that, where such charge is created by deed and expressed to be given by way of legal mortgage, it shall be capable of existing as a legal interest, which will confer substantial interests in the land on the mortgagee. It is difficult to class such a charge as an incorporeal hereditament; because the powers conferred by it are so wide. On the other hand, it certainly is not an 'estate.' It is, in fact, an almost new legal institution created by the Law of Property Act.

The vital importance of acquiring a legal interest in land is, as has been said, that when it has been acquired for valuable consideration by a purchaser (which includes a lessee and a mortgagee) in good faith, who has observed certain simple requirements of the Law of Property Act, that purchaser acquires a safe title, which will overreach any equitable interest affecting the interest purchased, whether he had notice of it or not, except in a few very special cases. These requirements are so important, that they should be carefully indicated. They are as follows:

(a) That, where the conveyance is made under the powers of the Settled Land Act, the purchase money be paid to the trustees for the purposes of the Act.

(b) That, where the conveyance is made by trustees for sale, the purchase money be paid to such trustees.

(c) That, where the conveyance is made by a mortgagee or personal representative in the exercise of his paramount powers, the purchase money be paid to such mortgagee or personal representative.

(d) That, when the conveyance is made under the order of the Court, the purchase money be paid into Court or in accordance with the order of the Court.

It is a general principle, that a single trustee shall not receive purchase money, unless he is a 'trust corporation,' i.e. a corporation authorized by the Trustee Act to act as a sole trustee.

It will be observed that the cases above enumerated do not cover what would appear to be the most ordinary case of all, viz. a sale by an absolute owner, with, perhaps, the concurrence of a mortgagee. That is, doubtless,



true ; and, in such a case, the purchaser would have, no doubt, to protect himself by the ordinary searches and enquiries. But the increase in the practice of registration of title, and especially of 'charges' or encumbrances, renders this liability yearly less onerous ; and there is a special provision for enabling an absolute owner to create for himself a trust for sale, which will bring a purchaser from him under the protection of clause (b) of the above requirements.

Finally, before leaving the subject of legal interests, it may be well to point out, that interests of these classes are also perfectly capable of existing as equitable interests. It is only when they are conveyed in a proper manner, with proper titles, that they take effect as legal interests. We now turn to those classes of interests in land which are *only* capable of existing as equitable interests.

### EQUITABLE INTERESTS IN LAND

(i) *Life interests*.—These are said to be the oldest interests in land known to the Common Law ; and it was the rule until quite recently, that a conveyance of land 'to A,' simply, gave A only a life interest. The rule has now been altered ; but its persistence is an unconscious testimony to the ancient origin of the life interest. A life-owner has, obviously, less interest in the land than the owner of the fee simple ; but he has, in theory at least, a greater interest than any lessee for years, however long his term. Thus, the life-owner is entitled to work mines already open when his interest began (though not to open new mines). Moreover, he is in possession of the subsoil as well as the surface ; and, therefore, no new mine can be opened without his consent. But, like the lessee for years, he is liable to 'positive' waste, i.e. injury to the land or buildings ; though, unlike him, he is not liable for 'permissive' waste, i.e. non-repair. Owing to the fact that life-interests are usually created by family settlements, it is not infrequent to give the life-owner power to commit waste, or, as it is put, he is made 'with-

out impeachment of waste.' In that event, the life-owner can open new mines, cut ordinary timber, and the like. But, even in such a case, he may not commit wanton or outrageous waste, such as pulling down the mansion house, grubbing up ornamental timber, and the like. This kind of waste goes by the odd name of 'equitable waste,' because, originally, only a Court of Equity would restrain it.

There is a curious and not very common form of a life interest, known as an interest *pur auter vie*, e.g. when land is given to A during the life of B, or where A, tenant for his own life, assigns his interest to X. In the first case, the interest will come to an end on the death of B, in the second on that of A, who, obviously, cannot grant a greater interest than he has himself. Such an interest is of little practical importance; but it may be mentioned that there are statutes which facilitate the settlement of the question whether the life on which the interest turns has really dropped, or not.

(ii) *Entailed interests*.—An entailed interest is an interest which will, unless 'barred' or converted into a fee simple, be capable of descending on the owner's death only to the issue of his body, i.e. his direct descendants or 'heirs,' or to his issue by a particular spouse, or, in either case, to heirs of a particular sex only. From the year 1285 onwards to the year 1926, it was possible to create such an interest, but in land only, as a legal estate; and it was so created in almost every strict settlement of a landowner. Moreover, it was clearly the intention of the framers of the statute '*De Donis*' of 1285, that the owner should not be able to alienate or encumber his estate during his lifetime, to the prejudice of his issue. But, by an extraordinary exercise of judicial boldness, this intention was evaded, through the ingenious use of fictions, probably within a century of the passing of the statute. It was only necessary for the 'tenant in tail' to go through a rather expensive fictitious lawsuit, to obtain the power of dealing with the land as though he were a tenant in fee simple. Not, however, until 1926

was it possible to affect an estate tail by will; for a man can hardly conduct a fictitious lawsuit after his death.

The legislation of 1925 has made great changes in the law of entailed interests. In the first place, they can be created to apply to 'any property, real or personal,' instead of only to land. In the second, the entail can be 'barred' by an ordinary deed made in the owner's lifetime, without any special formalities. In the third, entailed interests can be disposed of by an owner's will, provided that he makes his intention quite clear; and, in that case, they will be liable for his debts. But if he fails to do so, they will go to the 'heir in tail,' according to the form of the entail, discharged from the testator's debts, including, it would seem, Crown debts. The power of defrauding his creditors after his death thus offered to the owner of the entailed interest, seems difficult to justify. As is, of course, implied by the new legislation, entailed interests can only exist as equitable interests.

The powers of the owner of an entailed interest, as regards the user of the subject-matter of the entail, are unlimited. The law of waste does not apply to him. When entailed interests could only be created in land, this liberty was not unreasonable; for, after all, land cannot be consumed or destroyed. But now that they can be created in chattels, it will be interesting to see what becomes of an entailed cellar of wine or fleet of motor cars after a generation or two.

(iii) *Future interests*.—Under the names of 'remainders' and 'executory limitations,' various classes of interests in land could be created in expectancy, either at the Common Law or under the Statute of Uses. The differences between the two classes were highly technical; and the learning involved in acquiring a knowledge of the rules of determining them quite out of proportion to the value obtained. Now, subject to the severe rule known as the 'Rule against Perpetuities,' which applies to all kinds of property and will hereafter be explained, many kinds of future interests can be created, but only as equitable interests, which will take effect by way of trust;



the test of their validity being whether they were capable of existing as equitable interests before 1926. One of the commonest examples is that in which a father by his will leaves property for life to one of his children, with a direction that, on the child's death, it shall go to the child's children. The latter are said to take by way of remainder or expectation. They may or may not have a vested (i.e. certain) interest from the creation of the remainder. In the case put, they would have. But it would be open to the testator to say that only such of his grandchildren as had attained twenty-one on their parents' death should share in the bequest ; in which case, a grandchild's share, until he attained twenty-one, would be 'contingent' or uncertain. The unsatisfactory feature of the expectant interest, from the point of view of the beneficiary, is, that, until the prior interest determines, he gets no income or other direct benefit from the gift. It is jam to-morrow, but not jam to-day. He can even sell or mortgage his expectancy ; but he will only do so at a very serious loss, especially if his interest is 'contingent.'

One curious result of the recent legislation has been the disappearance of the true 'reversion' from amongst the list of future interests. A reversion was the interest which was left in a person who, out of his larger interest, created a smaller interest to be held of him by tenure. The reversion arose without express words, merely by operation of law. Reversions used to be ranked as 'incorporeal hereditaments' ; but, as we have before remarked, the most important example of all in modern times, viz. a reversion on a term of years, was not reckoned as an incorporeal hereditament or a future interest. In fact, it can now exist as a legal estate, which no future interest can. A true reversion was created when a tenant in fee simple created out of it a life estate or an entailed estate. But as we have just seen, an entailed interest and a life interest can now only exist as equitable interests ; and there is no tenure between a legal owner and the owners of equitable interests affecting his estate. The word 'reversion' will be found in the new Acts ; but only as applied



to so-called reversions on terms of years, or to expectancies and possibilities generally.

Having now enumerated and briefly described the various classes of interests in land which may be found to exist as equitable interests (and it will be remembered that these include those capable of existing as legal interests, but not in fact so existing), we must, in concluding this chapter, ask ourselves the very important question : what security or protection for their rights have the owners of such interests ? If they have to give way whenever a purchaser for value in good faith, observing the proper requirements, acquires a legal interest in the same land which is obviously inconsistent with their interests, what good will it do them to have an equitable interest at all ?

The answer is, as explained in section 3 of the Law of Property Act, that the chief security of the owner of the equitable interest lies in the willingness of the Courts to enforce his equitable duties upon the owner of the legal estate affected. We must again remember the fundamental principle, that no equitable interest can exist except there be a corresponding obligation on the part of a legal owner to give effect to it. There may not, at a given moment, be any such person. If there is, the Court, in its equitable jurisdiction, will take prompt steps, at the request of the equitable owner, to make him give effect to the equitable interest. If there is not, it will generally be found that there is a person who has parted with the legal estate to another. In such a case, if that other is a *bonâ fide* purchaser for value who has observed the proper precautions, there can be no recourse against *him*.

But there can be recourse, not only against the personal liability of the former owner of the legal estate, but against the money which has been produced by the sale. And it is the subject of some of the most stringent provisions of the Act, to ensure that these proceeds shall always come, so far as possible, into safe hands. Equity has had long experience of 'following the trust property,' and will ruthlessly set aside any devices adopted by a fraudulent

trustee or other legal owner to conceal the proceeds of his fraud. Thus, to take a concrete example, if trustees, having the legal estate, fraudulently conspire to cheat their beneficiaries by selling that legal estate to an innocent purchaser and confiscating the purchase-money, though the beneficiaries could not set up their claim against the purchaser, they could not only prosecute and imprison the trustees, but, if the trustees had paid the money into their respective banks, or invested it in shares of a company, the Courts would compel the banks or the company to hold the money or the shares for the benefit of the beneficiaries. If the owner of the legal estate were not technically a 'trustee,' e.g. if he were simply a vendor who, having agreed to sell the estate to B, and thus given him an equitable interest in it, had subsequently conveyed the estate to some one else, the remedies against him would not be quite so drastic; but they would be pretty effectual.

This is then, the main security of the equitable owner; and it remains only to consider, with regard to it, what happens if rival equitable owners, with inconsistent interests, endeavour to enforce them against the owner of the legal estate. Suppose, for example, A has a life interest in property in the hands of trustees. He sells it to B, and then, fraudulently concealing the sale to B, sells it again to C. B and C cannot both be satisfied. Until quite recently, the rule was, so far as interest in land were concerned, that, subject to proof of actual negligence in their owners, equitable interests ranked in order of their creation, or dates. But, by a somewhat startling novelty introduced into the new Property legislation, the rule applicable to successive assignments of things in action, to be hereafter explained, was extended to equitable interests in land; and now, such interests will rank in the order in which notice has been given, to the owner of the legal estate, of their claims against it. Owing to the curious wording of the section in question, it seems that such notice need not be in writing. But the point is doubtful.

There are other remedies, of a minor character, open to the equitable owner. It is always well for such a person, if he can, to get possession of the title deeds; for that will certainly put any *bonâ fide* purchaser on enquiry. Certain classes of equitable interests, too, (but not all) may be registered at the Land Registry; and, in such cases, the purchaser, however *bonâ fide*, will not be able to disregard them. He should have had search made at the Registry, and ascertained that the title was clear. Or again, in certain cases too technical to be explained here, the owner of the legal estate may actually be compelled to convey a legal interest to the equitable owner, who, of course, thereupon becomes a legal owner, with the privileges attached to legal ownership.

Still, however, when all is said, equitable ownership is, and is by the recent legislation deliberately recognized as being, less secure than legal ownership, particularly in the important fact that the equitable owner can rarely, if ever, demand possession of the land as of right (or, in the case of chattels, the chattel) which is the subject of the ownership; though the Court may, if it sees fit, let him into occupation of it. This is, in fact, the original and cardinal distinction between legal and equitable ownership; and it is curious to note how it persists in altered circumstances. The Statute of Uses of 1535 was avowedly an Act for 'transmuting uses into possession.' After four hundred years, it has become clear that that Act was a failure; and it has been repealed. But the distinction remains. Equitable ownership, unlike legal ownership, is not strictly *in rem*, or objective, i.e. enforceable against all persons, but only relative, i.e. enforceable merely against a legal owner whose conscience is affected by it, against careless persons who deal with him without due precautions, and against equitable owners with inferior claims. Yet it would be absurd to say that it is not property at all, but a mere personal right against certain individuals. It is property, but property of an anomalous and peculiar kind. It is one of the most striking and characteristic features of English Law.



## CHAPTER XXV

### THE LAW OF PROPERTY IN CHATTELS

It has previously been remarked, that the original idea of a 'chattel' in English Law (as, indeed, the word itself implies) was that of a concrete object deriving its value from its physical qualities. An ox, a sheep, a sword, a hammer, household furniture, and the rude tools of primitive agriculture, were what our ancestors thought of when they spoke of 'chattels.'

But we have also seen, that the gradual elaboration of industrial, and, still more, commercial life, ultimately produced another and totally different type of chattel, or movable, whose value lay, not in its physical but in its legal qualities, i.e. the extent to which the Courts would give effect to the meaning expressed by it. Regarded as a concrete object, a bill of exchange for a hundred pounds is worth, perhaps, a fraction of a penny; regarded as a promise to pay by a man of means, it may be worth one hundred pounds. So with bonds, share certificates, letters patent creating monopolies, policies of insurance, and a host of other 'things in action,' as they are called. To these the name of 'incorporeal chattels' is sometimes given, in distinction from the 'chattels corporeal' or concrete objects of the older law; and these terms are valuable, because they point to one striking difference between the two classes of objects, viz. that concrete objects can be *possessed*, i.e. can be the subject-matter of that visible or corporal control of which some description was given in a previous chapter, while purely legal objects, like things in action, cannot. It is, therefore, impossible that the two classes of chattels should be the subject of identical rules; and, in fact, the distinction creates a convenient subdivision of the Law of Property in Chattels, into (a) the



law affecting chattels corporeal, and (b) the law affecting things in action.

### THE LAW OF CHATTELS CORPOREAL

Owing to the destructible and perishable nature of most chattels corporeal, the Common Law refused to recognize the possibility of successive interests in them. A common lawyer would have regarded it as ludicrous to suppose that you could have an estate for life, or years, far less an entail, in chattels. It is true that Chancery, probably impressed by the greater permanence of some of the newer things in action, e.g. Government stocks and East India Company shares, began gradually to give effect to the creation, by will or testament, of life interests in chattels. And, as we have seen, by a very remarkable provision of recent legislation, even entails can now be created 'in any property.' But the views of the common lawyers have left far too deep a mark on the Law of Chattels to make it possible to treat it on the lines of Land Law; though what has recently been said with regard to the distinction between legal and equitable ownership applies, with the necessary modifications, to the Law of Chattels.

So far as legal interests are concerned, English Law, in its treatment of chattels corporeal, still adheres to the view of the Common Law, that the only way of dividing the property in a chattel corporeal between two independent persons is by vesting the possession of the chattel in the one and leaving the ownership in the other. The necessary separation is usually (though not invariably) effected by the process known as 'delivery,' or, as our ancestors called it, 'bailment'—a process which we shall have to consider with some care when we come to deal with alienation of property. Here it is sufficient to say that, when a man delivered goods to a carrier to be carried, or to a hirer to be used, or to an artificer to be repaired, or to a tailor to be made up, or to a creditor as security for a debt, he was said to 'bail' the goods to these persons; and the result

of the transaction was, in the view of the Common Law, to vest the possession of the goods in the person to whom they were delivered (the 'bailee,' as he was called), while leaving the ownership in the deliveror, or 'bailor.'

As was before pointed out, in the chapter dealing with the nature of possession, it is a striking but intelligible fact, that the Common Law, in its desire to protect the possessor, heaped upon him rights and remedies which we should be inclined to think more properly belonged to the owner ; particularly in view of the fact that bailments of goods were usually for quite short periods. Thus, if a third party damaged or made away with the goods in the possession of the bailee, the latter had an action of Trespass against him for the whole of the loss, though, obviously, the whole loss would not fall on the bailee, whose interest might be trifling. A very remarkable illustration of this rule occurred at the beginning of the present century, when a Government transport carrying mails was run into in a fog off Table Bay in South Africa, with the result that a large part of the mails perished. It having been decided that the other vessel was to blame, the Postmaster-General made a claim against the owners of the blameworthy vessel for the value of the lost mails. These owners, in effect, pleaded (a) that the mails did not belong to the Post Office, which was only a carrier or bailee of them, and (b) that, being under no liability to reimburse the owners, the Postmaster could not claim against the wrong-doers. The case was argued with great thoroughness in the Court of Appeal, which decided that both contentions of the defendants were wrong, and awarded the Postmaster the full value of the mails.

A similar rule prevails in the case of other wrongs by third parties. Thus, if I hire a horse for the season, and send him to be put up in the stable of X, who wrongfully refuses to give him back on my demand, I can bring against him the action of Detinue ; and he will not be allowed to defend himself by saying : "The horse is not yours." Again, if I send goods to an auctioneer to be sold, and a rival auctioneer gets hold of them and sells them, my

auctioneer will have an action of Conversion against his rival, though he has only had temporary possession of the goods. Nay, even against the owner himself (the bailor), the possessor-bailee, though he must, in the ordinary way, restore the goods when demanded in due course, yet may, in many cases, insist on holding them till repaid for the labour and skill, and other proper expenditure upon them, whereby they have been improved or kept in good condition. This right of holding till expenses have been paid is called a 'lien,' and is one of the most valuable rights given by the Common Law to bailees such as carriers, innkeepers, wharfingers, and others. In some cases, such as innkeepers, the lien actually confers the right to sell the goods eventually, if the lien is not discharged; but, in most cases, it is simply a right of holding, and it is lost if possession is given up. It must be distinguished from the 'maritime lien' alluded to in a previous chapter, and from the 'equitable lien' which arises when a vendor sells land without getting the price, or a purchaser pays his purchase-money without getting a conveyance. These liens arise and are enforced in wholly different ways from that of the common law lien; and they do not necessarily involve possession.

As against this strongly-guarded position of the possessor or bailee, the owner, or bailor, seems almost out of the picture. It is true that he has an action of Detinue against his bailee, to recover his goods; and, at one time, the Common Law was inclined to enforce this claim with great severity. It was almost in the nature of a 'real action.' The plaintiff said, in effect: "You have had my chattel; you must return it." And in the face of the numerous rights given to the bailee, this does not seem, at first sight, an unreasonable view.

But as business transactions increased in complexity, it came to be considered rather hard on the bailee that he should practically guarantee the safe return of the chattel bailed to him. Suppose it was stolen without any negligence on his part. Of course the bailee would have the action against the thief, if he could be found. But



probably that wasn't worth very much. Or suppose the chattel (e.g. a horse) 'died on him,' without any fault of his. And so, gradually, moved by these considerations, the Courts began to imagine implied 'contracts' of bailment, in which the bailee's liability varied according to the circumstances. Thus, for example, if I, out of pure good-nature, allow a friend to leave his stamp-collection at my house whilst he is away on a voyage, and, by the carelessness of my servant, it is destroyed, it is a little hard that I, who stood to gain nothing by my possession, should have to make good the loss. On the other hand, if I made a business of storing articles of value, and charged for doing so, the case might be different. And so there gradually grew up a not very clearly-defined code of liability for bailees, varying from gross negligence to slight negligence, according to the circumstances. But the old liability of the carrier for all loss "except by the act of God or the King's enemies," and the almost equally high standard of liability of the innkeeper, survive to remind us of the stricter rule of the Common Law.

As for the owner's remedies against third parties, they seem to be singularly few, except, perhaps, where the bailment was a mere temporary arrangement, which the bailor could determine at any time. There is a case of 1862, in which the owner of a barge, let out for hire to R for an unexpired period, was allowed to recover damages against a railway company which had dropped a boiler into the barge and broken the latter whilst it was in R's possession. Both Court and counsel in that case actually spoke of a 'reversion' in the plaintiff. But the decision stands severely alone; it was somewhat inconsistent with earlier decisions; and even the Court which pronounced it admitted that no action for Conversion could be brought by an owner out of possession. Any way, there can be no true reversion in a chattel, which cannot be the subject of tenure. A more practical question is, whether, if the bailee had recovered the full value of the chattel from a thief or other wrong-doer, the owner could claim from the bailee the money paid. It is suggested that, on principle,



he could, as "money had and received to the plaintiff's use." But there is very little authority on the point.

With regard to the respective rights of the owner and the possessor of the chattel, other than rights of action, the general principle is clear, that the possessor has only those rights which were, expressly or by implication, given him by the 'contract' of bailment. This is a question of fact for the jury, unless the terms are expressed in a written document, when it is for the Court. But some things are clear. If I lend an article to a man for his private use, e.g. a book to read, or a horse to ride, he has no right whatever to put the book in the sitting-room of his hotel, for all his guests to use, or to let out the horse on hire. On the other hand, if I let out plate and cutlery to a restaurant-keeper on business terms, he is justified in using it in his restaurant, and so on. It is a matter of common-sense or express bargain. The only right which definitely passes to the bailee by every bailment is the right to the exclusive possession of the chattel until the bailment is properly determined.

On the other hand, subject to any bailment which he may have made, the owner's rights in the chattel are limited only by the general Law of Nuisance. He can use it as he likes, lock it up, change its character, sell it, give it away, injure it (subject, in the case of animals, to the provisions of the Criminal Law), or destroy it altogether. The owner of a firework or an explosive bomb may not fire or detonate it in the street. But that is not because of any restrictions on his right of ownership; it is merely because such an act would be a public nuisance. He could do it lawfully in the privacy of his own land. Ownership of chattels corporeal may be, and generally is, 'absolute.'

#### THE LAW OF THINGS IN ACTION

The expression 'things' (or 'choses') 'in action' now includes a considerable number of miscellaneous pro-

proprietary rights, arising in very different ways, and, except in one very important respect, having very little similarity to one another. It covers such things as ordinary debts, negotiable instruments, annuities and pensions, shares, stocks, and debentures, copyright, patent rights and rights in fabric designs, trade marks, trade names, and that mysterious entity known as the 'goodwill' of a business, which has been happily described as 'property at its vanishing point.' Nothing but the very briefest description of each can be given here.

1. *Ordinary debts* usually arise out of trade contracts, e.g. contracts for the sale of goods; but sometimes they arise from bonds or covenants in settlements and other deeds. Naturally, they can only be enforced against the other party to the contract; but the creditor's right to sue the debtor has a certain proprietary value, which can be sold, and which, in the case of the creditor's bankruptcy, ranks among his assets. A debt must be for a fixed or ascertainable sum of money; other kinds of obligations arising out of contracts are not classed as 'debts,' and are, as a rule, untransferable.

2. *Negotiable instruments*.—These are also debts, being fixed sums of money arising out of contracts, but they are governed by very special rules, set out in the Bills of Exchange Act, 1882. Negotiable instruments comprise bills of exchange (including cheques), promissory notes, bearer bonds, and any other instrument recording or creating a pecuniary liability which, by the custom of merchants, is so treated. Their special importance in commerce is that, unlike most property rights, they are protected in the hands of a *bonâ fide* holder for value, even though he acquired them from a person who, in fact, had no title to them. Thus, if a thief stole a cheque payable to bearer, and passed it to a shopkeeper who had no reason to doubt his honesty, for value received, the shopkeeper could hold the cheque as against the former owner, from whom it was stolen. Contrary to popular belief, Bank of England notes and Treasury notes are not negotiable instruments, though they share the valuable

characteristic of being protected in the hands of a *bonâ fide* holder for value. But so also does current coin of the realm, which is hardly a negotiable instrument.

3. *Annuities* and *pensions* are, as the name of the former implies, yearly payments made, sometimes *ex gratiâ* and sometimes for value received, to their holders, usually during their lives only, though perpetual annuities and annuities for years are not unknown. Annuities may be charged on land or other property in such a way that no one is personally liable to pay them; the sole remedy in default of payment being against the property.

4. *Shares*, *stocks*, and *debentures* are intimately associated with companies; but the Crown may create stock as part of the public debt, and municipalities as part of their municipal liabilities. Shares are, as their name implies, definite units of capital in a combined enterprise, each having a distinct identity, though ranged in classes, and being indivisible. Their value, of course, depends on the prosperity, actual and prospective, of the company, as expressed by the dividends, or share of the profits of the enterprise, which are paid on the shares. Stock, on the other hand, is divisible to any extent and in any sums; its yield may be either a fixed rate or one fluctuating with the profits of the enterprise; and there can be no liability on it for calls of unpaid capital. But, of course, if it is stock of an ordinary commercial enterprise, its value, and, indeed, its existence, depend on the success of that enterprise. Fully paid-up shares may be converted into stock.

A debenture is a simple acknowledgment of indebtedness by a company, and differs from an ordinary bond debt mainly in the fact that it is usually charged on the assets of the company, on which the debenture-holders, therefore, have a claim prior to that of the ordinary creditors of the company. This charge may be either a 'fixed charge' on definite assets owned by the company, and henceforward inalienable by it without the consent of the debenture-holders; or, by a very ingenious arrangement, known as a 'floating charge,' it may be a charge



only on such assets as the company has when the debenture-holders (whose rights are generally vested in trustees) resolve to enforce their claims.

5. *Copyright* is the monopoly right conferred by law on the author of a literary, musical, dramatic, or artistic work of an original character, of controlling the sale of copies or the reproduction of such work, usually in any form. No formality is requisite to obtain it; but any one who, intentionally or unintentionally, violates it, may be stopped from doing so; and, unless he proves entire good faith and ignorance of ill-doing, he may be made to pay damages. Copyright lasts during the life of the author and fifty years after; and it is protected by the peculiar rule, that no assignment of it by the author (otherwise than by his will) will have any effect after twenty-five years from his death, at which date the copyright will return to his representatives.

6. *Patent rights* and *designs* are likewise monopoly rights conferred upon the inventors of new manufacturing processes, which are actually acquired by the grant of letters-patent or registration. Monopolies of this kind are jealously regarded by English Law; and a historic struggle in the seventeenth century led to the establishment of severe restrictions by the Statute of Monopolies; the chief being that the duration of the monopoly should be limited to fourteen years in the case of manufacturing processes. By later Patent Acts, renewals up to twenty-eight years were permitted in cases in which the inventor had not received adequate reward within the shorter period; and, after the Great War, the normal period was extended to sixteen years. The maximum duration of monopoly in 'design' is fifteen years. Infringements of such monopolies are vindicated in the same way as violations of copyright.

7. *Trade marks* and *trade names*, as things in action, are also monopolies of indications showing the association of certain classes of goods with the proprietors of such indications. These proprietors need not be the actual manufacturers, much less the inventors, of such goods.



A man may take the commonest article, such as flannel, and, by associating a particular make, or shape, or colour of it with his trade mark or name, acquire, owing to the peculiar psychology of the public, a valuable monopoly of the use of that mark or name for that class of goods. A certain element of originality in a trade mark or trade name is required ; but the requirements are not very rigid, the chief object of them being to prevent an enterprising merchant acquiring a 'corner' in representations of a common object or an ordinary word in the language. The right is acquired by registration, and lasts at first only for fourteen years. But it can, apparently, be renewed indefinitely, so long as it is actually exercised. A trade mark or name which has not been *bonâ fide* used in connection with the goods in respect of which it was registered, for a period of five years, may be removed from the Register ; and a trade mark can only be transferred in connection with the goodwill of the business concerned with such goods. Infringements of trade marks and trade names are vindicated as those of copyright and patent rights.

8. *Goodwill* is merely the result of the habit of the public, or a certain part of it, to resort to particular premises or particular dealers or manufacturers for the supply of particular wants. Of course, the public cannot be constrained to resort to a particular refreshment-house or a particular doctor if it does not wish to do so ; but, so great is the force of habit, that the probability that it will do so is, sometimes, of enormous value as a saleable commodity. Naturally, all that the law can do to protect the purchaser of such an intangible entity is to prevent the vendor from rendering nugatory his own voluntary act in transferring the goodwill, by competing with the old habitués of the place or practice. Accordingly, the proprietor of a business who obtains a high price for his premises by assigning the 'goodwill' of the business, cannot cheat the purchaser by setting up a rival establishment next door or opposite. But, much to the indignation of some purchasers, there is nothing whatever to

prevent a stranger setting up the most vigorous competition. For the purchaser has acquired no monopoly ; he has merely contracted to step into his predecessor's shoes. And, as the latter had no right to complain of competitors, neither has he.

It is quite impossible, in a work of this kind, to explain in detail the rights and remedies of the owners of things in action further than has been done in the foregoing paragraphs. Many of them, e.g. negotiable instruments, patents, and copyright, are subject-matter for substantial works dealing with them alone. The subject of stocks and shares involves, for full understanding, a treatise on the huge and complicated machinery set up by the Joint Stock Companies Act and other statutes. These works are for specialists. In concluding this chapter, we can touch here only on the fundamental and important distinction, before alluded to, which separates chattels corporeal from things in action.

This is, that chattels corporeal, as we have seen, can be made the subject of possession, whilst things in action cannot. Possession is, essentially, as we have also seen, a physical fact. It can, therefore, have no application to ' things ' which exist only in the eye of the law. Put in the clearest way, you cannot possess a thing which you cannot sit upon ; and, though you can, no doubt, sit upon the paper or parchment which is the title to those legal conceptions which are called bills of exchange or shares, you cannot sit upon the subject-matter which that paper or parchment represents.

The consequence is, that that separation of interests which, in chattels corporeal, is, as we have seen, effected by the process of bailment, dividing ownership from possession, is, in the case of things in action, impossible. Thus, for example, there can be no pledge, hiring, deposit, or carriage of things in action. Again, things in action are outside the scope of such statutes as the Sale of Goods Act, the Bills of Sale Acts, and, with one curious exception, the ' order and disposition ' clause of the Bankruptcy

Act; for all these enactments proceed largely on the assumption of possession. It is true that the deposit of a bill of lading may operate as a pledge of the goods to which it refers; but that is not a pledge of a thing in action. It is true, also, that a deposit of documents such as share-warrants and negotiable instruments may give the depositee a valuable hold on the rights which they represent, and may even operate as a charge in equity upon them. But this, unlike the pledge of a chattel corporeal, is a security in the ownership, not a lien on the possession of the thing in action; and the so-called 'lien' on documents of title is a totally different thing from the common law lien on chattels corporeal. In the case of monopolies like patents and copyright, something approaching to the relation of bailor and bailee is produced by the practice of granting licenses for the use of the patent process, or for the multiplication of copies of the copyright work. But the analogy is very faint. The license is really only a contract between the patentee or copyright owner and the licensee; it creates no rights against other persons, as a bailment does. It has been held that even the holder of an exclusive license cannot sue strangers for infringement of the monopoly.

Finally, it is necessary to remind the reader, that the distinction between legal and equitable ownership applies to things in action, equally with land and chattels corporeal, arises from substantially similar causes, and has similar results. Amongst other things, this distinction has enabled Equity, as above mentioned, by its administration of trusts, to permit of the creation of life interests, both in chattels corporeal and things in action. At law, of course, there could be, and can be, no life estate in either. But there is no difficulty in vesting such property in trustees, and directing them to pay the income to A for life, and, after A's death, to divide the capital among his children. Such arrangements are of everyday occurrence.



## CHAPTER XXVI

### ALIENATION OF PROPERTY

At the present day, the rule of English Law is, not only that all property is alienable, both during the lifetime and on the death of its owner, but that, with very few exceptions, it cannot be made inalienable by any agreement of the parties. It is regarded as a contradiction in terms to give a man property and forbid him to alienate it. In other words, the right of alienation has come to be looked upon as an essential part of the conception of property.

Every student of the history of English Law is aware that it was only after a long and bitter struggle that this freedom of alienation was achieved. We can go back to the days when even cattle and sheep were regarded as inalienable, and the man who was found with an ox formerly belonging to another man was presumed to be a thief. That land should be alienated without the consent of the kin or the lord of the owner, was at one time regarded as unthinkable. The general charter of freedom of alienation of English land was not won until 1290, and was, even then, very imperfect. The struggle to free entailed estates still went on; and victory was not completely achieved till the fifteenth century. Land could not be openly devised by will before 1540, except by special custom; and complete freedom of devise was not attained until 1925. For centuries after their introduction, the Common Law declared things in action to be inalienable; and the vigorous efforts of Equity and the Law Merchant to relax this rule only achieved a complete victory in 1873. Now, as has been said, with rare exceptions, property cannot even be made inalienable by agreement of the parties. These exceptions may be briefly disposed of.



Though permanent or perpetual ownership cannot (with rare exceptions) be made inalienable, temporary interests may be. Leases for years and life interests, for example, may be made inalienable, by a provision, either that any attempt to alienate them shall cause a forfeiture, or that they shall only last until the owner attempts to alienate them. In the case of leases, it is usual to make such a provision conditional only, e.g. to prohibit alienation without the consent of the landlord; and the Courts have large powers to prevent a harsh application of such a provision. Nevertheless, it would seem that, notwithstanding the latest legislation, it will be effective. Life interests in wills for the benefit of extravagant children are frequently made inalienable. Entailed interests, however, cannot, with the exception to be hereafter noticed, be made inalienable; neither can interests in fee simple absolute, nor the absolute ownership of chattels.

The conspicuous exception to this general rule of alienability of property is the case of the married woman, who, as we have seen, may be 'restrained from anticipation' of all or any of her property during her marriage. A restraint on anticipation of income does not, however, necessarily deprive the married woman of her power to bequeath the capital by her will; and the Court has certain powers to lift the restraint, in certain cases, for the benefit of the married woman herself or her creditors.

A less important exception from the general rule of alienability, is, that a person to whom a contingent interest is conveyed may be forbidden to alienate it until the happening of the contingency has actually vested the property in him. Thus, a child whose share in his father's property is made contingent on the son surviving his mother, may be effectually forbidden to alienate his share during his mother's lifetime.

But, while the power to prohibit alienation altogether is thus barely recognized by English Law, that law itself lays down certain rather important rules, and enables donors of property to lay down others, which have the

effect, direct or indirect, of imposing partial restraints on alienation.

We have already alluded, for example, to the clauses of the Bankruptcy Act which render certain 'voluntary' (i.e. gratuitous) settlements, made within limited periods before the settlor's bankruptcy, void, or at least voidable. There is also an old, but by no means effete statute of the year 1571, which enables creditors, without resorting to bankruptcy proceedings, to set aside any kind of disposition made by their debtor "to the intent to delay, hinder, or defraud creditors"; and a long series of decisions of the Courts has built up an exposition of the statute, which, in effect, renders it unnecessary to prove any actually fraudulent intent in certain cases. Thus, if a person makes a gratuitous disposition of his property which, in fact, leaves him insolvent, it will be set aside at the request of creditors who have been by it deprived of their remedies. So also, if a person, without making himself insolvent, deliberately gives away a substantial part of his property on the eve of embarking on a hazardous enterprise.

A somewhat later statute, of the year 1585, dealt with voluntary conveyances of land made to prejudice subsequent purchasers. So strictly was this later Act interpreted, that a doctrine grew up, that every gratuitous conveyance was *ipso facto* void against subsequent purchasers for value of the same land from the donor. This construction, naturally, tended to frauds almost as gross as those contemplated by the Act; and it was repudiated by statute in 1893. These three statutes are incorporated into the recent Property legislation. It is, therefore, necessary to emphasize the fact, too often forgotten by lawyers, that a free gift, either of land or chattels, carried out with suitable formalities, is perfectly binding between the parties, and cannot be revoked by the donor; unless, of course, it has been obtained by fraud or other malpractice.

Again, we have from time to time noticed conditions attached by the law to the alienation of certain kinds of

property, e.g. that a trade mark can only be assigned with the goodwill of the business concerned in the goods for which it has been registered. Such conditions, of course, restrict the operation of the power of alienation.

The most important rules laid down by English Law imposing restraint on alienation are, however, the Rules against Perpetuities and Accumulation of Income. These rules, though obviously restraining the free exercise of the power of alienation, are really intended to buttress, not to undermine, the general principle of freedom of alienation. They are hardly intelligible, however, apart from the system of 'settlements,' of which something must be said later in this chapter; and it will be better to postpone discussion of them till that point is reached.

With regard to partial or indirect restrictions on alienation imposed by the parties, it may be noted that there is nothing in English Law to prevent a donor of property imposing any lawful condition upon its retention by the donee. It is, in fact, quite common in wills to find clauses which deprive of all share in the testator's bounty legatees who marry persons of alien nationality, or who accept the tenets of a named religion, and so forth. Such provisions, at any rate so long as the property is in the hands of trustees, render it extremely difficult for the legatees to alienate their interests; for purchasers are, naturally, shy of giving money for property which may be forfeited by the subsequent conduct of their vendors.

Finally, by a very curious but wide-spread practice, a settlor may, while actually vesting his property in trustees, confer upon other persons powers to 'appoint' it, either to any one they like (including themselves), or to a member or members of a specified class. The former are called 'general' and the latter 'special' powers of appointment. Thus a testator, giving his widow or child a life-interest in property, will confer upon her or him a power to appoint the capital among her or his children at the death of the person to whom the power is given. It will be observed that the capital in question does not become the property of the donee of the power, though he or she has power to



dispose of it at death. If the power is not exercised by the donee's will, the property goes to the persons (whoever they may be) who would have taken it if no such power had been conferred. They are said to take 'in default of appointment.' But, in the case of a 'general' power which can be exercised by will, it is said that the mere appointment of an executor by the donee of the power will render the fund liable to the latter's debts; and a general bequest of his property will include property over which he has a 'general' power of appointment.

It is clear, that all powers of appointment restrict the alienability by its nominal owners, of the property affected by them.

#### OCCASIONS OF ALIENATION

The circumstances of modern life are so complex, that it is obviously impossible to allude to more than a very few of the more common occasions which give rise to alienation of property. We may, however, refer briefly to such important transactions as sales, leases, mortgages, and settlements.

1. *Sale*.—A sale, whether of land or chattels, is an absolute transfer of the vendor's interest in the subject-matter for a consideration calculable in money and known as the 'price.' It is, perhaps, the commonest of all types of alienation; and it can be applied to all kinds of property. It is, moreover, so familiar to most persons, that a detailed description of it is unnecessary. It is only necessary to remind non-legal readers that a 'sale,' though alluded to as a single transaction, is really two transactions, viz. (i) an agreement to sell, which, in the case of land, is sometimes a very elaborate business, and (ii) a transfer of the property, which, again, in the case of land and even things in action, involves considerable formalities, though, for some classes of goods, it follows automatically from the conclusion of the agreement to sell. Also it may, perhaps, be pointed out that, apart from special contract, the seller of land



and, probably, of things in action, undertakes no responsibility for the title to what he sells, except that he will not himself disturb it, and (except in rare cases) no responsibility for its condition, but that the seller of goods warrants that he has power to sell, and that, therefore, the buyer shall enjoy quiet possession of the goods, as well as various facts with regard to the condition of the goods, according to the circumstances of the agreement to sell. Perhaps, therefore, the most interesting legal question on sales for the general reader is : What happens if the seller, though acting in complete good faith, actually sold something that didn't belong to him ? Suppose, for example, I have bought from A a watch which has, in fact, been stolen from B, or received a stolen bank note in the ordinary course of business ?

Putting aside the question of recourse against the seller, which depends on the extent to which, as we have seen, he guarantees the title to the property sold, the purchaser of the property which does not belong to the vendor is faced by the general rule of English Law : " No one can give what he has not got " (*Nemo det quod non habet*). In other words, the purchaser must give up the property to its real owner. This is, no doubt, a hard saying for an honest purchaser who has paid his money ; but it is the rule, and is not so unreasonable as it sounds at first. After all, the owner who has lost his property deserves sympathy, no less than the honest purchaser. The rule applies equally to land and chattels.

There are, however, several well-marked exceptions from the rule : *Nemo det quod non habet*. In the first place, as has been already mentioned, it is one of the special features of ' negotiable instruments ' that a ' holder in due course,' i.e. a person who has taken all precautions and honestly acquired for value such an instrument during its currency, gets a title unaffected by the weakness of the title of the person from whom he took it. In the second, as we have also mentioned, the person who takes, honestly and for value given, current coin of the realm, bank notes, or Treasury notes, gets a good title, and may keep them ;

even though they turn out to have been actually stolen. Thirdly, if a seller of goods allows the purchaser to take possession of the goods or documents of title to goods, without paying the price, or the buyer of goods allows them to remain in the seller's possession after paying the price, and the party having possession sells them to a *bonâ fide* third person who believes that such person has power to sell them, then such third person gets a good title, despite the claims of the former seller or buyer respectively. A very similar exception covers the case of the owner of goods who has entrusted them to a 'mercantile agent' or factor for disposal, if the factor wrongfully sells them to a *bonâ fide* purchaser. And these exceptions apply to a certain extent, not only to purchasers in the ordinary sense of the word, but to mortgagees and pledgees.

Fourthly, if, under the system of registration of title to land, a *bonâ fide* purchaser acquires an interest by registered disposition, observing all the required formalities, he gets a good title to the extent professed to be conveyed to him by the registered transfer.

But perhaps the most interesting exception from the general rule is that known as the 'sale in market overt.' This is a curious survival from the days in which sales in open market were the only authorized means of disposing of goods. It has, of course, no application to land or things in action. But if a person buys, in good faith, in a public market, during authorized days and hours, goods of the kind for the sale of which that market is held, he gets a good title, though the seller had none. The exception does not hold against the Crown's claim; and, in regard to horses, certain special formalities must be complied with. Moreover, if the goods have actually been stolen, and the former owner prosecutes the thief to conviction, the Court will make an order restoring his goods to him, as from the date of the conviction. Thus the loss falls on the actual holder of the goods at the time of the conviction. But, subject to these limitations, the rule of market overt gives a real protection to honest purchasers. One curious extension of the rule is, that all

shops in the City of London are market overt during business hours for the goods which they profess to sell.

It should be carefully noted, however, that market overt privileges apply only to sales *by* the stall-holder. Sales to him are dealt with by the ordinary law.

2. *Lease*.—Of this enough has been said in the preceding chapter. Of great practical importance, it is interesting to the student of legal history as the one important surviving example of the great principle of tenure, which once dominated English Land Law. The leaseholder's estate is derived out of a superior estate, whose owner stands to him, technically, in the relation of a 'lord'; the estate being held by the tenant upon render of service, which, at the present day, takes the form of a payment of money rent. The old Law of Distress, i.e. seizure of the tenant's goods to make him render his services, the customary mark of the relation of lord and vassal, still applies to this estate, albeit shorn of much of its former terrors. Curiously enough, as has been said, it was not till the fifteenth century that the Common Law Courts recognized leasehold as a tenure at all.

3. *Mortgage*.—Allusion has previously been made to the rival views of Common Law and Equity on this important practical subject; and the overwhelming victory of Equity has resulted in a definition of a modern mortgage as a conveyance of property (any kind) to secure the payment of money or money's worth. In the vast majority of cases it arises out of a loan of money; but a mortgage debt differs from an ordinary debt in that it creates, not merely a personal obligation on the debtor, but a proprietary interest in the mortgaged property.

Until recently, in the case of a formal mortgage of land, this latter arrangement was effected by the conveyance by the borrower, or 'mortgagor,' of his property in the land to the lender or 'mortgagee,' with a proviso that, on repayment of the money and interest on the appointed day, the mortgagee should reconvey it to the mortgagor. Equity, as we have seen, allowed the mortgagor to redeem at any time ('once a mortgage, always a mortgage'),



however long after the appointed day, on payment of the principal debt, with interest and costs to date. Not until the mortgagee had obtained a decree of foreclosure absolute, did the property really become his. Consequently, the mortgagor's rights, though in theory only resting on contract, became an equitable ownership, or 'equity of redemption.' Apparently, this will continue to be the rule in formal mortgages of chattels.

But, so far as land is concerned, the new Law of Property Act has provided that a legal mortgage shall only be capable of being created by the creation of a term of years out of a fee simple, or of a sub-term out of a leasehold estate, in favour of the mortgagee. These terms may be, and usually are, for very long periods (two or even three thousand years in the case of a mortgage of a fee simple); and, naturally, they impose no rent or onerous covenants on the mortgagee-lessee. But, of course, in the case of a leasehold mortgage, they cannot exceed the term vested in the mortgagor. The details are too technical to be set out here. But the great change effected, from the legal point of view, by the Act is, that not only the mortgagee, and (which was impossible before the Act) successive mortgagees, but also the mortgagor, may all have legal estates in the same land, while the necessity, on redemption of the mortgage, for reconveyance of the mortgagee's estate, disappears; the mortgage term vanishing, and ceasing to cumber the inheritance. Moreover, by the new Act, a simple legal charge, having substantially the same effect as the creation of a mortgage term, may, as has been explained, be substituted for a formal mortgage; while the old equitable mortgages and charges, in which the legal estate remained in the mortgagor, are still possible. A familiar example of the latter is the deposit of title-deeds with a banker to secure a loan, accompanied by an agreement to execute a formal mortgage on request. It may also be mentioned, that, in continuance of the older practice, the first or earliest mortgagee, though, technically, only a tenant of the mortgagor, will be entitled to hold the deeds of the latter's estate.



The respective rights of mortgagee and mortgagor of land are carefully regulated by the Act. The former, though extensive, are strictly limited to the necessity for protecting and realizing his security; the mortgagor being regarded all along as the true owner. It is remarkable, too, that, while any of the statutory rights of a mortgagee may be excluded by the provisions of the mortgage, those of the mortgagor (with the exception of the right to grant leases) may not.

A pledge of chattels corporeal does not rank as a mortgage, because it transfers possession only, not property. But a pledgee (e.g. an ordinary pawnbroker) has a right to sell the pledge if the debt is not paid; though he has no right corresponding to the 'foreclosure' by which a mortgagee becomes absolute owner of the mortgaged property.

It is, perhaps, just worth noting, that, contrary to the rule in sales of land and things in action, in mortgages the mortgagor (borrower) warrants his title to the property which he mortgages. If this is not a strict rule of law, it is the invariable practice to make him enter into a covenant to that effect. But the point is not important; inasmuch as, save in very exceptional cases, the mortgagor remains personally liable to pay the mortgage debt, whatever happens to the property. Whether he is sued on the warranty or the loan makes little or no difference to him.

4. *Settlement*.—The statutory definition of a settlement of land is an instrument by virtue of which land stands limited in trust for any persons by way of succession, or for an infant, or charged with a family charge; and there is little reason to doubt that, in strict law, the same rule applies to chattels corporeal and things in action. In popular language, however, the term 'settlement' includes all dispositions of property by way of endowment or permanent provision for the benefit of one or more persons. It is true that, for important purposes, settlements are classed by the law as 'marriage settlements,' i.e. settlements made in contemplation of an already arranged marriage, and 'voluntary settlements,' including all settlements not so made, and that, while the former are

deemed to be made for valuable consideration, and, therefore, are practically unimpeachable, the latter are, as we have seen, being purely gratuitous, liable to be set aside in the interests of creditors. Still, both classes of settlements are alike in being made, not from business motives, but, ostensibly at least, from motives of affection or family sentiment. Voluntary settlements may be made either by deed, between living persons, or by will, to take effect on the testator's death. The latter, of course, cannot be set aside by creditors; for they only take effect after all the testator's debts have been paid. But they may be ineffective; because there may be no assets left after the debts have been paid.

A small, but highly significant change in the definition of a settlement of land appears in the legislation of 1925. By the older Settled Land Acts, the definition included instruments under which land stood limited 'to,' as well as 'in trust for,' any persons by way of succession. But it was one of the great objects of the new legislation to prevent *legal estates* being limited by way of succession. Consequently, the old distinction between what were called 'strict' or 'family' settlements—made with the object of keeping the estate in the family—and 'traders' or 'personal' settlements, which, whether they were of land or chattels, merely aimed at a pecuniary provision for its objects, has, technically, disappeared. Nevertheless, the distinction survives in substance, if not in form; and the many ingenious devices of the new legislation, intended, while making the land as freely alienable as the property under a 'personal settlement,' to continue the predominance of the tenant for life in possession, are most interesting, though far too technical to be described here. By the success or failure of them, the new legislation will stand or fall.

The lay reader must, however, realize, if he is to understand at all the settlement question, that, whether the hand controlling the settled land is that of the tenant for life, or the trustees for sale in whom, under a personal settlement, the property is vested, the great rule of policy

known as the Rule against Perpetuities, to which allusion has more than once been made, applies equally to both, and to all kinds of property. For, although the evils resulting from the tying-up of money are far less than those resulting from the tying-up of land, and the succession of equitable interests less embarrassing than that of legal estates, yet all alike may, if unchecked, prove dangerous to the Commonwealth. Therefore, the Rule against Perpetuities, though modified in detail by recent legislation, remains as firmly entrenched as ever, perhaps even in more stringent form, in English Law, and must now be explained.

The obvious effect of creating successive interests in land or chattels is, that, until the last one has 'vested,' i.e. become the absolute property (not necessarily in possession) of some person in existence, and of full age and capacity, there may be difficulties in dealing with the property. Until the last interest is so definitely vested, no one can say who is entitled to a voice in the matter. Consequently, purchasers and other persons dealing for the property are shy of bargaining. "You never know what might happen," they say, in effect. And, in spite of the numerous ingenious arrangements of the Settled Land Act and the Trustee Act, the difficulty will remain, unless a limit is put to the creation of successive interests, and especially of interests in favour of unborn persons. That is the key of the Rule against Perpetuities, which has now superseded certain old Common Law rules, of a highly technical character, laid down with a similar object.

The Rule against Perpetuities may be stated thus. Any disposition of a future interest in any kind of property which may by possibility take effect more than twenty-one years after the expiry of the last of a life or lives in being when the disposition is made, and named in it, is wholly void from the beginning, unless an owner within that period has power to override it entirely. You do not wait to see whether, in fact, the interest will take effect at a later date. It may be very unlikely to do so. But if it conceivably might, that interest is still-born.



And not only is that disposition void, but every disposition made to take effect after, or on failure of it, is void also.

The extreme severity of this rule is not apparent at first reading. In these days of prolonged age, a life or choice of lives in being and twenty-one years more seem a long period. But consider the case of Lord Stratheden's will. His lordship bequeathed "an annuity of £100 to be provided to the Central London Rangers on the appointment of the next lieutenant-colonel." That sounds innocent enough from the point of view of 'remoteness'; though there is, perhaps, a hint in it of malice towards the existing lieutenant-colonel. But it was pointed out by counsel for Lord Stratheden's executors, that a dilatory War Office might not appoint a new lieutenant-colonel for more than twenty-one years after the death of the existing one; and this objection was held to be fatal to the bequest. Of course this was a very extreme application of the rule; but a far commoner one is sufficient to show how easily it may be overlooked. If a testator bequeaths property to his son for life and on his death among his (the son's) children, that will be all right; because all the son's children will, necessarily, be born within the son's lifetime or within the period of gestation after (which is always allowed for by the rule). But if the bequest were "to my son Walter for life and after his death among his grandchildren equally," then the gift to the grandchildren would be wholly void; because though there *might* be no grandchildren of Walter born after Walter's death, on the other hand there very well might be. The utmost the testator could do in the desired direction would be, to make provision for grandchildren born, or at least begotten, in Walter's lifetime.

One particular cause of misapprehension in the rule should not be overlooked. It is not the length of the interest, but the point of time at which it takes effect, which is the essential. A lease for 300 years, to commence at once, or any time within twenty-one years, may be perfectly valid. But a lease for a much shorter period, say 30 years, to commence from a date more than



twenty-one years distant from the making of the lease or agreement to make the lease, is by recent legislation declared to be wholly void; notwithstanding that so-called 'reversionary leases,' i.e. leases to take effect on the expiry of a previous lease, are freely recognized by it.

Certain very extreme applications of the Rule against Perpetuities to such matters as powers, remedies against property, and the like, are abolished by recent legislation. But that legislation settles another ancient controversy in favour of the rule, by providing that the forfeiture of a fee simple estate for breach of condition cannot be made exercisable after the period of perpetuity. Thus, for example, if a benefactor gave a fee simple site for a hospital, and stipulated that, if the land ever ceased to be used for hospital purposes, it should return to him or his representatives, such a condition would be void unless it was expressly restricted to the duration of the donor's life and twenty-one years after. Apparently, the rule does not apply to forfeitures of leaseholds, which, as we have seen, are governed by other provisions.

It is, however, the fact, that the new legislation has, in one rather important respect, relaxed the strictness of the Rule against Perpetuities. Testators and other settlors, of a prudent or perhaps even timid disposition, often desire to prevent the absolute vesting of the benefits intended for young people till the latter attain twenty-five, or possibly some later age. It is extremely easy to violate the rule in such cases, with disastrous results. But the new Property Act lays it down that, in such cases, the disposition shall not be void, but shall take effect as though the age named had been twenty-one. This direction, it will be observed, violates the expressed intention of the settlor; but the latter would probably, had he been given the choice, have preferred a modification of his intention to an entire failure of his disposition.

In concluding this brief account of a most important rule, it may be pointed out, that the apparently arbitrary period chosen for the liberty of disposition is, historically, based on the old 'strict' or 'family' settlement, which

usually gave a life estate in the land to the settlor, with remainder to his first and other sons in succession, for entailed estates. Inasmuch as no one of these sons could break the entail till he was twenty-one, this disposition was, virtually, bound to last for the settlor's lifetime; for no son could effectively bar the entail without the tenant for life's consent. On the other hand, it could not last for more than twenty-one years longer; for any attempt to fetter the power of an adult tenant in tail in possession to 'bar' his entail was regarded by the law as ineffectual. But, of course, the possible substitution for the tenant for life of an arbitrary 'life or lives' has, in fact, considerably extended the possible duration of the lawful period.

The only other rule in connection with settlements which it is necessary to mention is the so-called Rule of Accumulations. This applies only to restrictions on the receipt of income; but it is obvious that, by directing indefinite accumulations of the income of settled property, the settlor might, in effect, unless restrained, evade the Rule against Perpetuities. It is therefore now the law, and has so been since the famous *Thellusson* Act of the end of the eighteenth century, that any direction to accumulate the income of any property for more than one of four alternative periods will be void as to the income arising after the expiry of such period. This, it will be observed, is in one way a much more lenient rule than that against Perpetuities; for it does not make the direction void altogether, but only as to the excess. If, however, the disposition directs accumulation beyond the period permissible under the Rule against Perpetuities, it is wholly void; but, in calculating the periods permissible under the Accumulations rule, accumulations directed by law (e.g. during a minority) are not taken into account. Nor are accumulations for payment of debts, raising 'portions' for children, or touching the produce of timber. The alternative periods within which accumulations may be directed are:

(a) The lifetime of the settlor;

(b) A term of twenty-one years from his death ;

(c) The minority of any person born or begotten at the settlor's death ;

(d) The minority of any person who, if of full age, would be entitled under the settlement to the income directed to be accumulated. This last is the *only* period for which accumulations directed to be invested in the purchase of land are permitted.

### METHODS OF ALIENATION

English Law recognizes six general methods by which property may be alienated. For special kinds of property special methods are occasionally prescribed ; but it will probably be found that these are merely modifications of the generally accepted methods. At any rate they cannot be discussed here.

1. *Deed*.—A deed is a document on parchment or paper which is signed, sealed, and delivered by the parties to be bound by it. The seal, which distinguishes a deed from a merely 'written' document, is, at the present day, a mere formality, consisting, usually, of a small paper wafer gummed on to the document by a clerk, (or even a mere engraved mark on the paper or parchment), and simply acknowledged by the party, who puts his finger on it after signing. In early days, it was the real means of identifying the parties. For the art of writing was then rarely practised ; and the cross mark of the illiterate, though used in really primitive times by persons such as Kings and Counts, was useless as a means of identification. Later on, every important person had his seal, which was carefully engraved in such a way as to prevent imitation. Indeed, it was said to be strict law, down to 1926, that a signature was not absolutely necessary for the validity of a sealed deed, except where so prescribed by statute ; but that very dangerous doctrine has now been altered, so far as individuals are concerned. Nevertheless, it is one of the quaintest freaks of legal conservatism, that the



presence or absence of a gummed wafer or engraved mark on a document should, in this rationalistic age, make any difference to its legal effect. In fact, it often does.

'Delivery' of a deed merely means putting it into circulation or effect, as distinct from treating it merely as an 'escrow' (scroll), or chattel corporeal. Deeds used to be classed as 'indentures' when made between two or more parties, and 'deeds poll,' when made by one person only; but this distinction has now ceased to have any importance. Still less does it matter whether a deed is *described* as an 'indenture' (as it usually is when there are two or more parties to it), or not; in effect, the most recent law encourages draftsmen not to use the colourless word 'indenture,' but to give a deed at the beginning the name of the kind of transaction which it is intended to carry out, e.g. 'This conveyance on sale,' 'This mortgage,' 'This lease,' etc.

Witnesses are not necessary to the legality of a deed, except in a few cases in which they are specially required by statute. But they are usually employed; and it is better, to avoid suspicion and enable disputed signatures to be verified, that they should 'attest' the deed, i.e. add their signatures and addresses under a short clause which states that the deed was signed, sealed, and delivered in their presence.

Any interest (except physical possession) in property of any kind may be transferred by deed. But this sweeping statement must be qualified by two additions, (a) that a deed is by no means necessary in a vast number of cases, (b) that, in some few cases, additional formalities are required, even if a deed is used. Let us consider these two qualifications.

(a) A deed is by no means necessary in all cases. In fact, it is only necessary for the transfer of legal estates in land, and the legal ownership of one or two classes of things in action, such as patents, annuities, shares, stocks, etc. It is, however, very common to employ it in other cases, e.g. in settlements of chattels; partly to give the document greater solemnity, partly to cover the cases

in which the settled property or any part of it may come to be invested in land, shares, or other property requiring a deed for its transfer. Very short tenancies of land, not exceeding three years, at full value, though they convey legal estates, may be created without deed, merely by word of mouth. But it is extremely foolish for both parties not to use at least a written document, even for a weekly or monthly tenancy.

(b) Again, the rule that any property can be transferred by deed must be qualified by the statement, that certain transfers cannot be completely effected by deed alone. The most conspicuous example is that of transfers of chattels corporeal which are intended to remain, and do remain, after the transfer, in the possession of the transferor. These transfers are governed by the Bills of Sale Acts, which require, amongst other highly technical features, in order to make the transfer completely effective, that particulars of the deed shall be registered in a public registry, accessible to the public, which is, therefore, in a position to learn that the furniture which is in Mr. A's house is not his own; and this knowledge may be of considerable importance to certain members of the public. Bills of sale are classified by the Acts as (i) 'absolute,' where it is intended to transfer the property in the chattels out and out, either by gift or sale, and (ii) 'security bills,' where the transfer is intended to secure the payment of money. The effect of the omission of registration or other formality required by the Acts is different in the two cases; but the differences are too technical to be explained here. Shortly it may be said, that an 'absolute bill' which fails to comply with them is not entirely void, but merely liable to be set aside by the creditors of the transferor, if it conflicts with their interests; while similar failure with a 'security bill' makes the whole transaction void, even as between the parties. No 'security bill' may be given to secure the payment of less than £30. Bills of sale are of very great interest to large numbers of tradesmen and money-lenders; and ingenious attempts to evade the restrictions of the Acts

are constantly coming before the Courts. One of the best-known is the 'hire-purchase agreement,' which, if *bonâ fide*, and carefully drawn up, may succeed in doing so, though it sails very near the wind.

Other cases in which additional requirements are necessary in the case of a transfer by deed are patents, in which entry of the transfer of legal ownership on the Patent Register is compulsory, shares (including shares in ships), and stock, of which the transfers must be registered either on the company's register or that of the Board of Trade or Bank of England respectively, and transfers of certain interests in land within the administrative County of London and elsewhere, under the system of Land Registration, to which allusion will be made later. An annuity charged on land will not bind a purchaser of the land unless it is registered at the Land Registry; and, presumably, therefore, all transfers of such annuities must be registered.

2. *Unsealed writing*.—Any equitable interest in any kind of property can be created or transferred by signed writing; and no equitable interest in land can be created or transferred except by writing signed by the person creating or transferring it, or by some person authorized by him in writing. This is a provision of the famous Statute of Frauds, of 1677, which has been incorporated into the new legislation; and it covers declarations creating trusts of land, and transfers (not creations) even of trusts of chattels. It should be carefully noted that, though a merely written document professing to transfer a legal interest in land will not have that effect, yet it may, and probably will, give the transferee a corresponding equitable interest. But an attempt to convey such an interest (or even an equitable interest) by mere word of mouth, will be totally ineffective. This important difference is due to the difference of wording (quite possibly accidental) between the old Statute of Frauds and the Real Property Act of 1845. But the result is fortunate.

A merely written transfer has no effect upon the legal ownership of chattels corporeal; but it is the general



means of transferring the legal ownership of things in action, unless a statute requires such transfer to be by deed. This is the result of the long battle between the Law Merchant and Equity on the one side and the Common Law on the other, before alluded to. At long last, by the Judicature Act of 1873, the provisions of which on this point have been incorporated into the new Property Legislation, the legal ownership of things in action, including the right of the transferee to enforce them in his own name, can be transferred by any 'absolute' assignment under the hand of the transferor, provided that notice in writing be given to the party liable on the thing in action. In the event of rival claims being made by different transferees, the latter will rank in order of notice to the party liable on the thing in action; and if this party is embarrassed by rival claims, he can obtain relief, either by the process known as 'interpleader,' or by paying his debt or other liability into Court under the Trustee Act, leaving the rivals to fight it out amongst themselves. This rule of priority by notice has long been a general principle when funds in the hands of a trustee or indifferent person are claimed by rival persons; and, as we have seen, it has, quite recently, been extended to rival claims of equitable owners of land against the owner of the legal estate.

3. *Word of mouth.*—No interest in land, legal or equitable, (other than the brief tenancies alluded to above) can be created or transferred by word of mouth; but any equitable interest in chattels, including a trust, can be created or (except in the case of trusts) transferred by word of mouth, and, in one very important case, the legal ownership of chattels corporeal can be transferred by purely oral means. This important case is that of a sale of goods. By the provisions of the Sale of Goods Act, 1893, when there is an agreement to sell specific and ascertained goods, the property in the goods passes to the buyer when it is intended by the parties that it shall pass; but if the agreement is unconditional, and the goods are in a deliverable state, the property will be deemed

to pass to the buyer at the time when the agreement is made, unless the parties otherwise provide. And it is quite immaterial, for that purpose, whether or not the price has been paid or the goods delivered. No one seems to know exactly how this rule, contrary both to Roman Law and the Law Merchant, and not very convenient in itself, made its way into the Common Law ; but its inconvenient effects are greatly mitigated by another provision of the Act, taken from the old Statute of Frauds, that a contract for the sale of goods of the value of £10 or upwards shall not be enforceable by action, unless the buyer shall accept, and actually receive, part of the goods sold, or give something in earnest or part payment, or unless a note or memorandum of the transaction, signed by the party to be charged or his agent, be made before the action is brought. Still, even with this safeguard, the rule applies in many cases ; and it will be observed that, even if a memorandum is drawn up and signed, the property in the goods passes by virtue of the agreement, and not by the memorandum. This is a general principle of all sales of goods. Not unnaturally, therefore, the question of when the transfer of the property in goods actually occurs, is constantly coming before the Courts. It should be noticed, however, that the rule we have just discussed has no application to gifts, only to sales. Therefore, if a young man is visiting his father's stables, and the father, in a moment of generosity, says to his son : " I give you this horse," and the son does not take the horse away at once, the son cannot enforce the gift ; even though the father should subsequently have acknowledged it in signed writing. But if the father had offered to sell his son the horse for £50, and he accepted, then, even if the son neither took the horse away nor paid any part of the price, the horse would be his ; though, unless he could get an acknowledgment in writing of the sale from his father he could not bring an action to recover the horse. But, if he found him in a field, he could take him away and keep him.

4. *Delivery*.—Delivery is the transfer of possession,

and, therefore, implies the concurrence of at least two persons.

That is the first thing to be grasped about it. The layman and, too often, the lawyer, misled by appearances, assume that delivery is a single act. Yet a moment's thought should disabuse his mind of this mistake. In the simplest possible case, where delivery of a small article takes place over a tradesman's counter, though there is, of course, the putting forward of the tradesman's hand, there must also be the putting forward of the customer's to take the article. The first act, of itself, is only an offer, or, as it is technically called, a 'tender' of the article, which may be refused. Similarly of goods delivered at my house. If a tradesman sends them without an order and dumps them on my door-step (a rather favourite form of advertisement a few years ago), here is no delivery, but only a tender. Not until I take the goods in, or do some act to show that I accept them, is there delivery. No possession can pass by a mere tender.

The true nature of delivery is, then, that it is an abandonment of possession by the existing possessor, in favour of another person, who thereupon takes possession. And, as the taking of possession is the transferee's act, so it must (in the absence of express agreement) be done at the transferee's expense. It is a well-known rule of English Law, that, in the absence of agreement or custom, the cost of carriage falls on the buyer. It is, in fact, for this reason that, to tempt buyers, advertisers announce 'free delivery.'

Also it must be remembered that, delivery consisting of two distinct acts, there may be an interval between the two. A seller of goods may write to a man who has agreed to buy them: "The goods are ready here awaiting your orders." That is tender. Weeks may elapse before the buyer accepts them; and, until that time, there is no delivery, though the buyer may have incurred legal liability for refusing to accept in accordance with his bargain, and the goods may be at his risk.

Once again, delivery may be made 'with the long hand,'



as when a man who has goods under lock and key at another's warehouse, or in a dock, hands over to another the key of the store, or a dock warrant entitling him to remove the goods. So long as there is no reason to doubt that the warehouseman or dock-owner holds the goods at the disposal of the transferor, save for mere storage charges, the handing over of key or warrant places the party receiving it in actual possession of the goods. A similar rule applies to buildings, whether a 'caretaker' is in them, or not. Perhaps the most striking and frequent illustration of the *longi manu* delivery is the handing over (duly endorsed when required) of a bill of lading of goods at sea. This act, though the goods are thousands of miles out at sea, puts the indorsee in possession of the goods; because the master of the ship must give them up to him on arrival. And it may make him owner of them—even, if done for valuable consideration, to the extent of enabling the indorsee to hold them against the unpaid seller's right to stop the goods *in transitu*.

Finally, it is of the greatest importance to remember, that delivery does not in all cases, even where the deliveror is owner or entitled to transfer the ownership, pass the ownership to the deliverer. Delivery always passes possession—that is its definition. But what else it passes is a question of intention. It would be ridiculous to say that, because I deliver my watch to a watchmaker to be repaired, I therefore make him owner of it. Consequently, whether a delivery effects a sale, a gift, an exchange, a mortgage, a pledge, or a loan, is a question of fact, to be decided like other question of fact. It may be noticed, incidentally, that it is by no means always to the interest of the deliverer to claim the highest effect for the delivery; because, if he acquires the ownership of the goods, he may also acquire liabilities attaching to them, e.g. for freight, salvage, cost of storage, etc.

Delivery is the oldest method of transfer by act of the parties known to English Law. At one time, it was capable of effecting a transfer both of interests in land and in chattels. But the extreme inconvenience of making

the title to land depend upon the memory of an unrecorded transaction like delivery, led to the practice of accompanying the 'investiture,' or 'feoffment' as it was later called, by a written charter or note; and, gradually, this requirement was made statutory. The Real Property Act of 1845 completed the tendency; and, as a deed then became the necessary accompaniment of a 'feoffment,' the formal delivery was dropped, and the deed substituted for it. Thus the old ceremonial 'feoffment' became a mere form; and one reads such absurd expressions as 'feoffment with livery of seisin,' whereas the livery (delivery) of seisin (possession) *was* the feoffment. Finally, a section of the new Property Act, of which the language is curious, declares that interests in land "are incapable of being conveyed by livery *or* livery and seisin, or by feoffment." But, of course, *possession* of land can still only pass by delivery, though delivery may be disguised in the form of a call at the agent's office for the keys.

Things in action are, by their nature, incapable of possession, as we have seen. Therefore, they cannot pass by delivery. But, as we have also seen, delivery of documents of title to them may, as in the case of negotiable instruments, actually pass the ownership, and, in the case of share-certificates and the like, create an equitable lien on the shares or stock for the benefit of the deliverer.

Still, it is for chattels corporeal that the method of delivery is the principal and most frequent mode of alienating property.

5. *Registration*.—We have seen already, that the legal ownership of certain kinds of property can only be transferred by registered deed; and it is impossible here to enter into details of Government, Bank of England, and Company Registers of stocks and other things in action. But a few words must be said about a movement which, beginning sixty or seventy years ago, culminated in the Land Registration Act of 1925, and which has now made it possible to transfer almost any interest in land more simply, more securely, and, as the advocates of the movement claim, more cheaply, than by ordinary deed or

writing. The subject is one of acute controversy among lawyers, who, from the knowledge of technical detail necessary to understand it, are almost the only persons who take any interest in it; and, at present, transfer by registered disposition is only compulsory for certain interests in land in the administrative County of London, where it has been in force since 1902, and, since 1925, in the County Borough of Eastbourne, and then only in sales. But it is plain from the terms of the Land Registration Act that it contemplates, at no very distant date, an extension of the system compulsorily to all England; and, in the meanwhile, it is made open to any landowner, anywhere, who pleases, to transfer his land, practically for any purpose, by means of a registered disposition. Even in the compulsory areas, however, the effect of a sale by unregistered deed is not entirely null. But such a transfer does not convey the legal estate, with which alone the Register deals.

It may be remarked, that the Land Registration system was imported from the Dominions, where, started under conditions vastly different from those prevailing in England, it has been an unquestioned success.

Put very shortly, the idea of the Act is, that a brief history of the title to every separate holding of land shall be entered on the Register, and that the person who appears thereby to be the legal owner of it shall be able to transfer it to any one, by registered deed, with a complete guarantee of title, which is backed, not by the transferor, but by the State. Thus, it is provided that a purchaser under the system, who is disturbed by a hostile claim, can simply hand the intruder over to the State, which, if the intruder proves that he, and not the registered owner, was really the person entitled to the land, will compensate him for his loss, out of a fund accumulated from the fees charged by the Registry for its various transactions.

But it must be understood that, for a very considerable time, the State will not take equal responsibility in all cases. In a Dominion, where the Crown ownership of all



land enabled the system to start with a clean sheet, this was possible. The applicant had only to show his Crown grant, probably not more than, at the most, fifty years old, and trace its history since its issue. In England, where a piece of land has been changing hands by private purchase for, probably, several centuries, no such summary procedure is possible. Therefore, in order to get an 'absolute' title, the applicant for registration must satisfy the Registrar that he has a title which would satisfy a "willing but prudent purchaser under an open contract." This may be no easy task. But the Registrar is authorized to accept a 'possessory' title, i.e. a title which merely records that, at the time of registration, the applicant is in peaceful possession of the land. In the case of an 'absolute' title, the State will guarantee a registered purchaser against all defects in title; in the case of a 'possessory' title, it will only guarantee him against defects arising since the registration. Still, as time goes on, the Statutes of Limitation begin to take effect, hostile claims are barred by lapse of time, and, after a dozen years or so, a merely possessory title ripens, in effect, into an absolute one. There are other similarly guaranteed interests of various kinds.

6. *Will (Testament).*—It is greatly to be regretted that a desire for brevity has induced the lay and legal public of England to substitute for the unequivocal word 'testament' the ambiguous word 'will,' to signify a disposition of his property made by a person to take effect on his death. But it would be pedantic to depart from popular usage.

A will, then, in the legal sense, is a disposition, of no legal effect during the maker's lifetime, and freely revocable by him, of the property of which the maker can dispose, whatever it may be at the moment of his death. If these qualities are intended to be present, then, by whatever name the disposition is called, it is a will; if any one of them is absent, whatever else it may be, or be called, it is not, by English Law, a will. The three qualities together are said to make the will 'ambulatory'; and any such ambulatory

disposition, whatever name it may assume, may be an effectual will, if it observes the required formalities, and is made by a person having testamentary capacity. On the other hand, however much a document may profess to be a will, if it is intended to bind the maker's hands during his lifetime, or to be irrevocable, or to take effect on any event other than his death, it cannot be a will.

Any one, including a married woman, who has attained the age of twenty-one, has sufficient sense to know what he is doing, and is not under the influence of terror or fraud, can make a valid will. A soldier on active service and a mariner at sea can make a will at the age of sixteen, and, moreover, without observing the formalities which are necessary in other cases.

These formalities, or, as they are usually called, 'solemnities,' necessary to the validity of an ordinary will are (i) writing, (ii) signature at the foot thereof by the testator or some one in his presence and by his direction, and (iii) attestation by two witnesses, both of whom sign the will as such in the testator's presence, though not, necessarily, in the presence of each other. Any one can be a witness who understands what he is doing; and it is not necessary that he should know the contents of the will, or even that it is a will which the testator is signing. But no witness, or husband or wife of a witness, can take any benefit under any testamentary document which is witnessed by him or her, or by his or her spouse.

Some systems of law attach particular importance to what are called 'holograph' wills, i.e. wills written in the testator's own handwriting, and even dispense in such cases with certain formalities which are essential to the validity of wills written by a professional adviser or his clerk. English Law, of course, raises no objection to a testator writing his own will; but it accords to such a will no preference or privilege over wills professionally prepared, at any rate in the matter of formalities.

A will may be expressed in successive documents, all except the first of which are called 'codicils,' or ancillary documents. But these must be signed and attested in

just the same way as wills ; and, in a legal sense, differ in no way from wills.

A later testamentary document overrules an earlier, to the extent necessary to give effect to the later ; and a will may also be revoked by being burnt, torn, or otherwise destroyed by the testator, or some one by his direction and in his presence, with intent to revoke. Destruction without intent (e.g. by accident), or intent without destruction (e.g. when the wrong document is burnt by mistake), will not be a revocation. Neither, of course, will be destruction by an unauthorized person. It is only in stage-law that "when the will cannot be found, the property goes to the nearest villain," or that possession of the will gives a title to the property. The only effect of the absence of the document in such cases is to make the will more difficult to prove. The will has then to be proved 'in solemn form,' after what is really a lawsuit, in which the evidence afforded by a solicitor's draft or copy, or even the memory of an individual who has read the will, may be accepted as sufficient proof to establish it.

Marriage of the testator also revokes any will previously made, except in two cases : (i) where the will was made in contemplation of the marriage in question, and (ii) in so far as the property disposed of by the will would not have gone to the testator's kin had he not disposed of it, e.g. trust property, or a fund which the testator had power only to dispose of among a specified class of persons.

The rules of testamentary disposition set out above are so simple and clear, and so widely known, that few cases about them arise. By far the greater number of testamentary cases coming before the Courts involve the meaning of the testator's language ; and the varieties of these are so infinite, that it would be impossible to go into them here. But, inasmuch as wills are often made in moments of emergency, by the testator himself or some layman, it may perhaps be stated that the golden rule for such cases is : "Know exactly what you intend, and say it in as few and simple words as possible." Above all, avoid like the plague such ambiguous expressions as



“not doubting that,” “feeling sure that,” “in full confidence that” (A will do so and so). Tell A exactly what you want him to do.

Some of the most costly and difficult lawsuits on wills have arisen out of a testator using language the effect of which he had not really thought out; and the Courts, with the keenest anxiety in the world to discover the testator’s meaning, were engaged in a baffling task, because the testator hadn’t any. Again, let an amateur will-maker scrupulously avoid the use of technical words which he has picked up, but, probably, not understood. If he wishes to devise land, let him not call it ‘real property’; if he wishes to dispose of a cottage in which he has lived, let him not call it ‘my personal hereditament.’ A lawsuit will, quite probably, be the result of these learned efforts.

A person may dispose by his will of all property which is his own at the moment of his death, except such (e.g. life interests) as comes to an end with his life. He may do so in general terms, e.g. “all my property whatsoever,” or specifically, e.g. “To my son George I leave my picture by Rubens”; and, speaking broadly, a specific legatee will have priority over a general legatee, to the extent of the property specifically bequeathed. On the other hand, a specifically bequeathed article may be ‘adeemed,’ or alienated by the testator in his lifetime; and the legatee will then have no claim to be recouped out of the general estate of the testator.

A testator’s intentions may be frustrated by the death of one or more of his beneficiaries in his lifetime. This is called a ‘lapse.’ In most cases, a lapse causes a total failure of the gift; but there are two cases in which it does not. The first is, when the testator has given any kind of property to any of his descendants, and that descendant has died in the testator’s lifetime, leaving descendants who survive the testator. In such a case, a legal fiction is applied; and the original legatee is deemed to have died immediately after (instead of before) the testator, with the result, that the property in question

passes by his (the legatee's) will, or goes to his (the legatee's) next-of-kin if he died intestate. It may be doubted whether the former alternative was ever contemplated by the framers of the Act, whose object probably was, to secure the property to the offspring of the original legatee. But that is the danger of legal fictions.

The other exception from the general rule of lapse occurs, where an entailed interest is bequeathed, by the will, in favour of a person (relative or stranger) who dies in the testator's lifetime. In such a case, the heritable issue take the interest again as if the original legatee had died immediately after the testator. But in both cases, it will, presumably, be subject to the claims of the testator's creditors; for no one can take a benefit under a will until all the testator's debts have been paid.

In all other cases of lapse, the property bequeathed to the person who dies in the testator's lifetime, goes either to the residuary legatees or by intestacy. In the case of a lapse of any share of the residue, there must be an intestacy as to that share, unless the will expressly provides that such share shall go to the other residuary legatees. Contrary to the widely entertained view, the addition of the words 'heirs,' or 'executors, administrators, and assigns,' or the like, to the gift to the deceased legatee does not prevent it lapsing, except, of course, in the case of entails, above mentioned; for these words are deemed to be only intended to mark out the extent of the interest given to the first legatee, not to confer any interest on his heirs. They are now, and, in a will, always have been, totally unnecessary for the former purpose, and should be shunned. Of course a lapse may be avoided by the testator providing expressly that if the first-named legatee dies in his lifetime, another (indicated) shall be substituted.

Generally speaking, it may be said that (a) a testator may by his will make any disposition of his property which he might have made by a disposition taking effect in his lifetime, and (b) no other kind of disposition. All rules affecting the legality of dispositions—such as the Rule against Perpetuities, the rules respecting legal and equit-

able interests, the extent of interests created, the illegality of objects, and so forth, govern equally deeds and wills. Perhaps the most substantial difference between the two modes of disposition is, that land given for charitable purposes by a will, though it goes to the charity, must be sold within a year of the testator's death, unless it is required for actual occupation by the charity; while a similar gift by deed, at any rate if sent to the Charity Commissioners to be recorded, may enable the charity to keep the land as an investment. But a word or two must be said about an anomalous kind of *post mortem* gift, which seems to be a compromise between an irrevocable and a revocable gift.

This is the *donatio mortis causâ*. A person who is, or believes himself to be, suffering from mortal or dangerous illness, may deliver a chattel (or, in the case of a thing in action, a document of title to it) to another, in contemplation of his death from that illness, as a gift. It must be understood between the parties that the gift is only to take effect in the event of the donor's death from the illness from which he is believed to be suffering; and the donor may resume possession of the chattel or the document at any time. But, if he does not do so, or if he dies from his illness, the chattel becomes the property of the donee; though it is, in the last resort, liable for payment of the deceased's debts.



## CHAPTER XXVII

### TRUSTS

SOMETHING has been said, in earlier chapters, of the origin of this remarkable institution of English Law; and reference has from time to time been made to the part taken by it in building up the distinction between legal and equitable ownership. For every interest created by a trust is an equitable interest; though it is by no means true, even now, that every equitable interest is created by a trust. Let us briefly examine the nature and working of the modern trust.

A trust is a conscientious obligation, voluntarily undertaken, but enforceable by law when undertaken, to hold or administer, or to hold and administer, property, conscientiously, for the benefit of another person or persons. Thus, there are four essential elements in every trust—viz. (i) a trustee or trustees, (ii) a beneficiary or beneficiaries (technically known as *cestuis que trustent*), (iii) property to be held or administered, (iv) a conscientious obligation on the trustee or trustees to hold or administer. Let us consider them in detail.

(i) Any one of full age and legal capacity can be, and act as, a trustee; and, by recent legislation, even a corporation can act as a trustee. Many corporations have been authorized to act as trustees, including the Public Trustee, with the State guarantee behind him. But no one can be compelled to be a trustee against his will, not even the Public Trustee; though the latter must not arbitrarily refuse to accept a trust. Even an executor upon whom the trust property of his testator descends, though he must, of course, respect the trust, is not, technically, a trustee of the trust property; and, as soon as possible, must hand it over to new trustees.

As a rule, a trust begins by a conveyance of property to trustees; but the owner of property may declare himself a trustee of it, and some trustees, e.g. Settled Land Act trustees, may not have the trust property actually vested in them. No special words are ever necessary to the creation of a trust; though it is prudent to use the word 'trust' if a trust is really intended. But a trust of land cannot be created without a writing signed by a person able to declare such trust; though trusts of chattels may (foolishly) be created by word of mouth. Trusts may, of course, be, and very frequently are, created by will.

The settlor (as the person creating the trust is called) may appoint a single individual as trustee; but the policy of the law is strongly against allowing trust property to remain in the hands of a single trustee, unless that trustee is a trust corporation. On the other hand, there cannot be more than four trustees of settled land or land held in trust for sale. There are various elaborate rules for filling up vacancies caused by death, resignation, or discharge of trustees; but it should be stated that a trustee, though his acceptance of office is voluntary, cannot for that reason resign at pleasure. There are, however, possibilities of doing this with the consent of co-trustees, if not less than two trustees will be left. And the Court may discharge a trustee, and may appoint a new trustee in the place of a trustee who becomes unfit, for any reason, such as absence from the country, or bankruptcy, to act. But a beneficiary cannot, without good cause shown, compel a trustee to resign. One of the special features of trusteeship is, as we shall see, that a trustee acts gratuitously; unless the settlor expressly provides for his remuneration. But this rule does not always apply to trust corporations, or to the Public Trustee.

(ii) Any number of persons may be beneficiaries under a trust. If the beneficiaries are named or indicated as individuals, the trust is called a 'private trust'; and its administration is supervised only by the Courts. If the trust is intended for the benefit of an indefinite section

of the public, such as "the poor of F——," or "persons suffering from blindness," or the like, it is called 'public,' or 'charitable'; and, in addition to being under the control of the Courts, it is supervised by a body called The Charity Commissioners. A much greater latitude is given to charitable than to private trustees in carrying out the settlor's intentions; and, when the directions of the settlor have become obsolete, or can no longer be precisely carried out, the Court may sanction a scheme for the reconstitution of a public trust, which it can never do for a private trust.

A beneficiary may be also a trustee of the same trust; but a sole trustee cannot be a trustee for himself alone, because no one can be under a binding obligation to himself. Any beneficiary of full age can call upon the trustees to hand over to him his share of the trust estate, and so end the trust, so far as he is concerned; provided only that such a proceeding would not risk the interests of other beneficiaries. Thus, for example, a trustee would not be justified in capitalizing the interest of an adult life owner, and paying the amount to him out of the trust fund, if there were infant or unborn children interested in the capital. But if all the beneficiaries are of full age and capacity, they can compel the winding-up of a trust; except, of course, that a married woman cannot do so in respect of her property restrained from anticipation.

Beneficiaries under private trusts can, however, unless expressly restrained from doing so (and we have seen that not all such restraints are valid), alienate their interests, without winding up the trust; and, as the owners of equitable things in action, purchasers or mortgagees from them will rank in the order in which they give notice of their acquisition to the trustees. For reasons too technical to be stated here, such persons should give notice to all the trustees.

Similarly, if a beneficiary should die before receiving his benefit under a private trust, he will be able to dispose of it by will; and, if he dies testate or intestate, it will pass to his representative, for the benefit of his creditors.



The law, as we shall see, has been more concerned with controlling the defaults of trustees than those of beneficiaries. But, where a beneficiary has instigated, or consented in writing to, a breach of trust, the Court may, in its discretion, impound any or all of that beneficiary's interest under the trust, to indemnify the trustee against any liability which he may have incurred through such breach; and no beneficiary can enforce any claim against a trust fund until he has paid all moneys due from him to the trust. Further, an adult beneficiary, of full legal capacity, is personally bound to indemnify the trustee against all expenses properly incurred by the latter in carrying out the trust; and no express request from the beneficiary to incur an expense need be proved by the trustee.

(iii) About the property included in a trust there is very little to be said. It may be of any kind, movable or immovable, corporeal or incorporeal, legal or equitable. It should be particularly noticed, that though, originally, a trustee was always a legal owner, that requirement has long since been abandoned; and equitable interests are, every day, made the subject of trusts. In such cases, of course, the trustees themselves only acquire an equitable interest, which they can only enforce and protect in the same manner as other equitable interests. Nevertheless, though they are equitable owners, they are not beneficial owners, and must as conscientiously perform their trust as though they were legal owners.

(iv) We now come to the last and most important element in a trust, viz. the conscientious obligation which binds the trustee. The whole point of this obligation, so far as trusts are concerned, lies in the word 'conscientious'; and it seems almost impossible to define a conscientious obligation more strictly than by saying that it is an obligation to act on behalf of another as one would if one acted prudently for one's self—in other words, a trust is an application of the Golden Rule. But even this definition has its dangers; for it might lead the incautious reader to suppose that a trustee might deal

with the trust property as freely as he might with his own—which would be quite untrue. A really prudent owner might, quite justifiably, run risks with his own property which it would be a gross breach of trust in him to run with that of his beneficiaries. Or again, he might, not merely justifiably, but laudably, give some of his own property away in charity; but he could not do so with trust funds. In fact, the only way in which a layman can form an accurate idea of what Equity calls a ‘conscientious obligation’ is, to examine three or four of the legal rules which it produces.

#### RULES FOR THE ADMINISTRATION OF TRUSTS

1. It is the primary duty of every trustee to carry out the directions of the settlement creating his trust. This settlement may vary from a document of a few lines to a small volume of many paragraphs; but, in either case, every word of it is binding on the trustee, except, of course, any clauses which enjoin him to act contrary to the law, or which aim at an illegal object, such as, for example, a violation of the Rule against Perpetuities. Consequently, before performing any act in pursuance of the trust, a trustee should consult the settlement to see whether it is justified; and it is only so far as the settlement is silent that the subordinate rules laid down by the Court apply. Even the Court itself cannot, at any rate in the case of private trusts, vary substantially the terms of a settlement; however foolish it may consider them.

Moreover, the trustee’s fulfilment of the duties laid upon him by the settlement, or by the law, must not be merely formal or mechanical. He must be ‘diligent,’ i.e. he must bring intelligence and care to bear upon his duties. True that the definition of ‘diligent’ is almost as elusive as that of ‘conscientious,’ and that only a long study of the decisions would enable the reader to

grasp completely the attitude of the Courts on the subject. But, for example, a trustee who invested a large sum of money on a mortgage without obtaining a report of an expert valuer on the property would certainly not act 'diligently,' even though the mortgage were of a kind authorized for investment. On the whole, however, the Courts lay greater stress on the doing of positively wrongful acts by a trustee, than on his failure to seize any opportunity for improving the trust property.

2. The *primâ facie* duty of the trustee (as distinguished from the personal representative) is not to dispose of, but to preserve, the trust property ; and it may be stated generally that trustees have no power to sell trust property, unless such power is expressly given them by the settlement or they can extract it from the provisions of an Act of Parliament. But such powers, and even trusts or express directions to sell, are extremely common ; and, indeed, it is the trustee's duty to 'realize' the trust property as soon as possible after undertaking his trust, i.e. to get in all outstanding claims, convert unauthorized securities into money, discharge outstanding liabilities, and, generally, to reduce the whole property to its safest and simplest form. Where a power of sale exists, the trustee may exercise it in any way that he honestly thinks best ; and his receipts will discharge an honest purchaser from seeing to the application of the purchase money. The general policy of the law is now not to place the actual management of land in the hands of trustees unless they are trustees for sale, but to leave it to the person entitled to the immediate life-interest. Where, however, there is no such person of full age, or if the tenant for life wishes to deal as such with himself in his individual capacity, the management falls to the trustees, who then have full power to grant leases, give receipts, effect insurances, repair buildings, determine tenancies, regulate the cutting of timber, and other such matters. Where these matters are in the hands of a tenant for life, it is the trustees' duty to see that they are properly administered. In the case of chattels, the administrative powers of the



trustees are even more extensive, particularly in the matter of investments, of which we say something below.

One of the most important administrative powers of a trustee is the power to advance, for the maintenance or education of an infant expectantly entitled to a share either in the income or capital of the trust property, the whole or a part of the income of his share in the trust property. Formerly, there were very technical rules which decided when an infant could, and when he could not, receive maintenance out of the income of property to which he was expectantly entitled; but, by recent legislation, such doubts have now been resolved in favour of the infant. Still, the discretion in the exercise of such powers remains with the trustees.

3. The trustees must exercise absolute impartiality between the different beneficiaries, and especially the different classes of beneficiaries, under the settlement. This duty does not, of course, mean that all the beneficiaries are to receive similar benefits; but it does mean that the trustees are to give effect to the expressed wishes of the settlor, without throwing their influence in favour of any beneficiaries to the detriment of others. This is one great reason why it is the trustee's first duty, after realizing the property, to invest it in permanent investments, either those expressly authorized by the settlor, or those enumerated in section 1 of the Trustee Act. A trustee ought not to keep unauthorized, hazardous, or wasting investments any longer than he can help; and, if he is obliged, from force of circumstances, to do so, he ought to be very careful not to allow the life interests to take, under the name of income, what is really part of the capital, e.g. payments under terminable annuities, short leases, and the like, but to capitalize the security, and only pay the tenant for life four per cent. on the capital value. Likewise, if part of the trust property consists of expectant interests, which yield little or nothing now, but will yield a great deal later on, the tenant for life may be entitled to have these capitalized, and to receive four per cent. on the value. This is the so-called Rule in *Howe v. the*

*Earl of Dartmouth*, a case at the beginning of the nineteenth century which first laid it down; and, though the rule only applies to trusts of chattels created by will, and, probably, only to general trusts dealing with the residue of the estate, it has not been abolished by recent legislation. Of course it can be, and constantly is, ruled out by the terms of the settlement itself.

Needless to say, grosser instances of preference between beneficiaries are entirely forbidden. Thus, for example, where trustees, who had trust property in the form of two mortgages of equal amount in trust for two sisters, insisted upon making over one to the elder sister when she came of age, reserving the other for the younger sister, they were sharply reprov'd by the Court, on the ground that, though for an equal amount, the mortgage reserved for the younger sister was much less secure than that handed over to the elder.

Similarly, there are very strict rules as to what part of the charges on or outgoings from property must be deducted from the income paid to the tenant for life, and what deducted from the capital reserved for the ultimate beneficiaries.

4. A trustee must at all times be prepared to render full accounts of his stewardship; and any reluctance to do so will incur the gravest reproof of the Court. Any beneficiary may now insist on having the trust accounts audited annually by an officially appointed auditor; though, of course, the expense of this precaution will fall on the beneficiaries. But if a trustee refuses to produce his accounts within a reasonable time, he will have to pay the costs of proceedings taken to compel him to do so.

A serious question arises on the exercise of these numerous duties and powers, as to how far the trustee, in performing them, may resort to assistance. The general principle is, that he cannot delegate to another the exercise of powers and duties entrusted to himself: *delegatus non potest delegare*. The beneficiaries are entitled to the benefit of the trustee's discretion and personal skill; and, if the trustee chooses to employ someone else to relieve

him of his responsibility, he must run the risk of the consequences. But the rigidity of this rule broke down in the Great War, when so many trustees were serving abroad ; and now, by the Trustee Act, any trustee intending to remain out of the United Kingdom for more than a month may appoint any person (other than his sole co-trustee) to act in the trust as his attorney during his absence, but with full responsibility for the acts of such agent, who will, however, be able to give effectual discharges to persons dealing with him. By earlier legislation, trustees are also empowered, in special cases, to employ special classes of agents, e.g. solicitors and bankers, to receive certain moneys, produce certain documents, manage foreign property, and do other things which a trustee cannot reasonably be expected to do personally ; and, in such cases a trustee will not be responsible for the defaults of agents employed in good faith.

And in all cases where expert advice should prudently be taken, the trustees are not only entitled but bound to take it, at the expense of the trust property. The point is that, after taking the advice, and giving it due weight, they must act on their own judgment. They are not even entitled, at the expense of the beneficiaries, to throw themselves on the authority of the Court ; though they are entitled, if a real difficulty arises, to apply to the Court in a summary way for directions.

5. Finally, it is a firm rule of Equity that a trustee must make no profit, direct or indirect, out of his trust. The general rule is so clear, that even professional persons, such as solicitors, surveyors, etc., acting as trustees, cannot make their ordinary professional charges for any work done in connection with the property of which they are trustees, unless expressly authorized by the settlement to do so. They are only entitled to be reimbursed expenses actually incurred by them.

But the rule goes much further than this, and prevents a trustee retaining for his own benefit any surplus arising after the fulfilment of the trust, or any indirect advantage coming to him by virtue of his position as a trustee, even



though not at the expense of the beneficiaries. Thus, any surplus remaining after a trust has been fully performed, is held as a 'resulting' trust for the settlor or his representatives, or, if they are extinct, for the Crown, even though there is no clause dealing with it in the settlement. Such a trust is an 'implied' trust. Again, if a lease held as part of the trust property expires, and the trustee renews it for his own benefit, then, even if the lessor expressly refuses to renew it in favour of the trust, the trustee will be obliged to hold it on behalf of the beneficiaries. This is an example of a 'constructive' trust.

Again, a trustee cannot bargain with his co-trustee for a purchase of any part of the trust property. Such a transaction is merely void. And, even when the trust has expired, if the ex-trustee deals with his former beneficiary, about what was, at one time, trust property, the bargain is looked at suspiciously by the Courts; and the ex-trustee will not be allowed to insist on it unless he can convince the Court that he acted in perfect good faith, not taking advantage of his special knowledge, or his influence over his former beneficiary.

#### SAFEGUARDS OF TRUSTS

No voluntarily undertaken obligation is more severely safeguarded than the obligation arising out of a trust. Not only is the trustee who actually converts trust property to his own use liable to criminal prosecution, as formerly explained, but the civil remedies for breach of trust are more severe than those for ordinary debts. For example, though imprisonment for ordinary debts has now been abolished for more than half a century, the Court may order a trustee who has by breach of trust occasioned a loss to the beneficiaries of money which has actually been in his possession or under his control, to be attached and imprisoned. Again, a claim against a trustee founded on *fraudulent* breach of trust is not, like ordinary debts, extinguished by the trustee's discharge in bankruptcy.

Once more, though a trustee may now, as a general rule, plead lapse of time in answer to a claim against him, he cannot do so if the claim is based on fraud, or fraudulent breach of trust, or is to recover trust property, or the proceeds thereof, which is still retained by the trustee, or has even been previously converted to his own use. All this is, of course, in addition to the fact that an order on a trustee personally to repay to the trust fund any loss occasioned by his breach of trust can be enforced as an ordinary judgment by execution against his property. Finally, it must be remembered, that a trustee is liable, not only for his own acts, but for those of his co-trustees, which, through his negligence, have been permitted in breach of the trust ; though in such cases, he may have a claim for indemnity against his co-trustees.

Is it any wonder that, in these circumstances, there should be often a difficulty in inducing careful and responsible persons to undertake the thankless, unremunerative, and dangerous office of trustee ? Or that the setting up of the office of Public Trustee and of other trust corporations has been widely welcomed ? The hardships of trustees were to a slight extent, however, mitigated by a clause in the Judicial Trustees Act of 1896, which empowered the Court, in cases in which a trustee has, technically, been guilty of a breach of trust, to relieve him from the personal consequences of such breach, if he has acted reasonably and honestly. In theory, of course, if a trustee has acted 'reasonably and honestly,' he has not been guilty of breach of trust at all. But the section was evidently intended to mitigate, in appropriate cases, the severe interpretation of the word 'reasonable' by the older decisions.

On the other hand, the beneficiary has remedies for breach of trust not confined to his personal remedies against the trustees. Especially may he, as before mentioned, follow the trust property, or its proceeds, into various hands, so long as its identity can be established ; and there are ingenious but highly technical rules for ascertaining the priorities of rival claimants to such funds,

which cannot be stated here. The object of ' following the trust property ' is, of course, to secure it for the exclusive benefit of the beneficiaries, as against the general creditors of the trustee. That is one of the most valuable privileges of trust property, and distinguishes it clearly as property, and not as a mere personal claim against the trustee. On the other hand, it must be remembered, once more, that claims of this kind, being equitable only, are subject to the governing rule, that no such claim can be enforced against a legal owner of property who has acquired it honestly for value and after taking due precautions.

In conclusion, it seems desirable to say a word about a misunderstanding which prevails widely, not only amongst laymen, but even among lawyers, as to the distinction between a trustee and a ' personal representative,' i.e. the executor or administrator of a deceased person.

There can be no doubt that the similarities between these two offices are very striking, more striking, perhaps, than their differences. Both involve the exercise of gratuitous care, much discretion, and strict propriety. In the majority of cases, both trustees and personal representatives hold property which they are bound to administer for the benefit of others. Both are subject to the exceptional rules before alluded to, of imprisonment for misappropriation, liability even after discharge from bankruptcy, and restriction of the ordinary right of a defendant to plead lapse of time as an answer to claims against him. Both can be held to the strictest account for their administration ; and neither can (unless specially authorized) make any profit out of his office.

But the great difference between them is, that, whereas the primary duty of the trustee is to preserve the trust property, the primary duty of the personal representative is to distribute the deceased person's estate as soon as possible. The trustee's is a permanent, the personal representative's a temporary office, at any rate in intent ; though circumstances may make a trustee's tenure of office short, and that of a personal representative long.



Consequently, the personal representative has, as a rule, greater and more drastic powers than a trustee in dealing both with the property and the beneficiaries. He is, as his title implies, the 'representative' of the deceased; while the trustee is only a 'delegate' of the settlor, bound to carry out more or less precise instructions. It would be beyond the scope of this book to enlarge on details. But the nature of the distinction is illustrated clearly by the frequent case of trusts created by will. Not until the personal representative has 'wound up the estate,' can the trust be properly constituted; till then the trustees have no right to the trust property, nor any liability for its administration.

## CHAPTER XXVIII

### LAW OF OBLIGATIONS. 1. CONTRACTS

THE history of the Law of Contract in England is interesting and instructive. It illustrates with vividness the manner in which, in a country with a native Common Law, chapters of that law are compiled. It is, in fact, a typical instance of legal evolution.

The founders of the Common Law, at the commencement of their task, were confronted with the existence of certain social relationships too conspicuous to be ignored. Before the end of the fourteenth century, as the Year Books show, such relationships as innkeeper and guest, lender and borrower, seller and buyer, consignor and carrier, craftsman and customer, master and servant, surety and principal debtor, were familiar to the Courts of Common Law; and the task of these Courts was to regulate those relationships according to well-established custom, and enforce that custom against people who broke it.

As a matter of fact, such relationships had not arisen, at any rate in some cases, out of anything that could accurately be termed a contract, or even an agreement. Particularly was this true of such relationships as master and servant, surety and principal debtor, and even craftsman and customer. The first was a survival of rapidly disappearing serfdom, the second of ancient court procedure, and the third, probably of some kind of gild or other communal arrangements. But others, e.g. those of buyer and seller, consignor and carrier, and innkeeper and guest, had arisen because such-and-such a person had 'taken upon himself' (*assumpsit super se*) to supply certain goods, or ferry people for hire, or lodge casual travellers, and the like. And as these relationships were probably rather

new in the fourteenth century, the judges were inclined to lay a good deal of stress on the terms of the 'undertaking,' or *assumpsit*, in question. So the development of the law on these subjects proceeded, in the terms of Sir Henry Maine's famous formula: 'from status to contract.' And people began to seek remedies for breaches of these relationships by the action of *Assumpsit*. Gradually the Courts laid it down, that an 'undertaker' who actually mishandled his job, e.g. a ferryman who overloaded his boat, or a surgeon who clumsily maltreated his patient, was liable for damages, if loss or injury followed, and that, even for mere negligence or lack of proper care, resulting in loss to the other party, he might also be made to suffer.

But at this stage the Courts halted, and shrank from going to the length of saying that, for mere failure to carry out any 'undertaking,' a man would be liable in damages; for the judges could not but remember that the great 'Glanville' had asserted that mere 'private conventions' are not enforced by the King's Courts. It looked, therefore, as though England were going to stop at the point at which the development of other systems of law had been arrested, i.e. at the stage of recognizing the existence only of a limited number of specific classes of contracts, with definite names.

Such an arrest would have been disastrous for an expanding and progressive community. For the effect of the 'nominate' theory of Contract is, inevitably, to cramp legal development, by laying it down that no arrangement can be recognized as a contract which does not conform to one of a number of recognized types—sale, hiring, suretyship, carriage, and so forth. And the inconveniences of such a system are vividly illustrated by the efforts made by the great system of Roman Law to evade it, by means of 'pacts,' 'conventions,' and the like.

Fortunately for England, just at the critical moment, the Common Law Courts stumbled, no one quite knows how, upon a principle which enabled them to generalize their century of labours upon the possibilities of *Assumpsit*,



into a definite and flexible theory, applicable to all cases, which has made the English Law of Contract the admiration of the world. It was an intellectual effort of no mean order; and it could only have worked in a community which had already risen to a moral level which implied respect for the pledged word.

#### ‘ VALUABLE CONSIDERATION ’

The principle in question is the doctrine of ‘valuable consideration.’ While the Common Law Courts, at the end of the fifteenth century, could not bring themselves to say that mere failure to perform any kind of undertaking should give rise to an action, they were nerving themselves to say, that a man who failed to perform an undertaking which he had entered into in return for some reward, promised or given, should be held liable to pay damages to the disappointed party. That was the first crude form of the doctrine of ‘valuable consideration.’ But a generation of lawyers occupied in working out its application soon realized that a valuable consideration might as well consist in a loss or liability suffered by the party to whom the undertaking or promise was given, as of a benefit or reward given by that person to the undertaker or promisor. And so, by the end of the sixteenth century, we arrive at the classical form of the doctrine, that a valuable consideration is a benefit given or promised to the undertaker, or, some loss or liability incurred by the promisee, in return for the promise given by the undertaker. In most cases, in fact, the two things are one and the same; because, presumably, the undertaker would not give his promise, unless he was to derive some benefit from the other party.

Thus, by the end of the sixteenth century, we find, alongside the old, limited theory of the ‘formal contracts,’ made under sealed instruments or tallies, a new and comprehensive theory of the ‘simple contract,’ or the agreement, requiring no particular form, or even proof,

but tested by the element of 'valuable consideration.' The Court will no longer ask : "What sort of a contract is this"—sale, hiring, service, or the like? It will be sufficient to maintain the action of Assumpsit, if the defendant has made a promise, express or implied, of any lawful kind, in return for 'valuable consideration.'

The superior flexibility and comprehensiveness of a doctrine of this kind over the old theory of 'nominate' contracts, or sealed writings, is manifest. The real trouble is, to know how or from whom this remarkable doctrine came into English Law, defeating the rival theories of the Roman, the Canon, and the Merchant Laws. The first systematic statement of it seems to be contained in a well-known little work entitled *Doctor and Student*, published about the year 1520 ; but this treatise, interesting as it is, gives us no hint as to the origin of the doctrine. One can only suppose, that the unloosing of the mediaeval mind which was partly the cause, partly the result, of the religious reformation of the sixteenth century, took the form, in the case of the Common Law judges, sharpened by their contest for power with the rival jurisdiction of Chancery, of a restatement of social relationships in terms of mutual promises. It was an epoch-making change in the law. One has only to think of the part which the informal contract plays in the ordinary business life of to-day, to imagine what English Law would be like without the theory of the simple contract.

### NATURE OF A CONTRACT

A contract, then, is an agreement or undertaking, entered into by at least two parties, and enforceable by an action for damages, wherein one or more of the parties promises, expressly or by implication, to do or refrain from doing certain acts at the request or for the benefit of another party ; the promise being either given for valuable consideration or embodied in a particular form.

Let us examine briefly the implications of this definition.

1. *Parties*.—There must be at least two parties to a contract; though only one of them need incur any obligation under it. A man cannot contract with himself alone; and though he may, in form, contract with a group of persons which includes himself, in effect he will be treated as having contracted with the other members of that group alone. No man can effectively enforce an obligation against himself.

On the other hand, a contract may be made between any number of different parties, or, which is, perhaps, the more common case, a number of different contractual engagements between different persons may be embodied in a single arrangement or document, loosely called a 'contract'; and difficult questions may arise as to who is entitled to enforce these different engagements, and against whom. But it will be best to defer that matter to a later stage.

What is clear, and important to remember, is, that no one who is not a party to a contract can sue on it or be sued on it. It is this rule which distinguishes a contract, giving rise only to rights *in personam*, from a conveyance, or alienation of property which creates or transfers rights *in rem*. Thus, if I engage a builder to build a house for my son, who has offered to pay £100 a year rent for it, I can sue the builder for non-performance of his job, and he can sue me for non-payment of the price agreed to be paid for building the house. But my son cannot sue either of us on the contract; nor can either of us sue him if he refuses to take a lease at £100 a year, unless he has actually become a party to a contract to that effect.

There has of late years grown up, largely in connection with Trade Union disputes, a doctrine of 'interference with contractual relationships,' really a branch of the Law of Torts, which tends to obscure this important rule, though it is not actually inconsistent with it. It is said that, if, for example, I am in the habit of dealing with A, a coal-merchant, and B, actuated by a desire to injure



me, persuades or terrorizes A into refusing to fulfil his contracts with me, I can sue B for damages. That is, probably, true, at least of certain classes of contractual relationships. But, observe, I do not sue B on my contract with A, which is to deliver coal. I sue him for interfering with my right to get coal from A. Still, the reluctance with which this doctrine has been accepted by the Courts betrays some doubts as to its soundness.

Any person of full age and legal capacity may be a party to a contract ; and we have already sufficiently discussed the disabilities of age, mental unsoundness, *ultra vires*, and the like, which, to some extent at least, impair the contractual capacity of individuals and corporations. We need not refer to them again.

2. *Agreement*.—To arrive at an agreement, the minds of the parties must be at one, or, as it is put, there must be a *consensus ad idem*. But it is not every *consensus* which will create a contract. A mere intellectual agreement is not sufficient ; for, as we have seen, the origin of the simple contract is an ‘undertaking,’ which implies a promise to do, or abstain from doing, an act or series of acts. Thus, if A and I agree that B is a thief, that is no contract ; because it does not bind either of us to adopt any particular line of conduct. But if A and I agree that we will not any longer supply goods to B, that is an agreement of a contractual kind, because it is to affect our future conduct.

It was, probably, to emphasize this truth, that the late Sir William Anson, in his well-known work on the Law of Contract, laid it down as an axiom, that every contractual agreement could be resolved into an offer and an acceptance. He has been criticized on this account ; but Sir William Anson’s analysis is applicable to the vast majority of cases of contract, and it is extraordinarily helpful in deciding the vital question : “When is a contract entered into or concluded ?” To which, Sir William answers, in effect : “When the offer of one party is definitely accepted by the other.”

In simple cases, the truth of this analysis is obvious.

Suppose I enter a shop, and, pointing to a walking-stick, say to the proprietor: "How much?" He answers: "Seven and sixpence." I reply: "I'll take it." The shopkeeper's answer is, clearly, an offer to sell the stick for seven and sixpence; my reply is a clear acceptance of that offer. There is a contract between us. But, if I had added one single qualification to his terms, e.g. "I'll pay you next week," the shopkeeper would have been fully entitled to decline the whole transaction. And, though the analysis is infinitely more difficult, that is also the test applied to a long series of negotiations, oral or written, which are alleged to have resulted in a contract. The sole question is: "Was there ever a moment at which the terms of one party were clearly and definitely before the other, and by that other definitely and without qualification accepted?" If yes, there is an agreement. If not, either party has a right to be off the bargain; for an offer is revocable until it is accepted, and, if it is not accepted, neither party is bound.

In the case of a simple contract, offer and acceptance may be expressed in any manner that the parties choose to adopt—speech, writing, signs, or other conduct. A common example of a contract being completed almost entirely by conduct is where a passenger holds up his hand to a passing taxicab-driver, opens the door of the cab, simply pronounces his destination, and enters the cab. By plying for hire, the driver offers to drive any member of the public to any place within his radius at the tariff rate. By hailing him, the passenger agrees to pay him the tariff rate for his services. Similarly, when a customer enters a shop, takes up a priced article, puts the money down on the counter, and walks out of the shop carrying the article. But, in more complicated cases, the parties naturally prefer, after a preliminary discussion of terms, to make and accept the offer in writing; and, as we shall later see, there are some kinds of contracts which cannot be directly enforced, unless a record of their terms, signed by the party liable, is drawn up on or after the conclusion of the agreement.

## FLAWS IN CONTRACTUAL AGREEMENTS

An agreement being a state of mind, any influence which so seriously affects the minds of the parties to an alleged contract as to render them incapable of arriving at an agreement, or *consensus ad idem*, is necessarily fatal to the contract. Law being an applied science, and the upholding of contracts a most important matter, trifling influences affecting the mind, such as a headache, though they may, perhaps, prevent a party from being at his best, do not justify him in going back on his promises. But, apart from general influences, such as infancy, unsoundness of mind, and corporate character, which have been already discussed, both Common Law and Equity recognize certain special influences, applied at the time of making the contract, as fatal, in greater or less degree, to its validity. Of these the most important are duress or constraint, fraud or misrepresentation, and mistake.

*Duress*, in the view of the Common Law, means physical constraint, applied to the person alleged to have entered into a contract, to make him do so. A typical instance would be holding a pistol to a man's head to make him sign, or imprisoning him till he signed. But the Common Law recognizes also, that a man whose wife or child is threatened with violence unless he will sign a bond for a large sum of money, does not sign as a free agent. In all such cases, the contract is void from the beginning, even at the expense of an innocent holder. It is not 'his deed.'

Equity goes further, and recognizes that even 'undue influence,' quite independently of a threat of physical violence, may render the mind incapable of appreciating the nature of an agreement. It is difficult to define 'undue influence,' except by saying that it is a moral or mental control established over a weaker character or mind by a stronger, and unconscientiously used to the disadvantage of the weaker. When a crafty and experienced money-lender deals with a very young man having no knowledge of business, Equity recognizes that the



parties are not on equal terms ; and, if proof is given of 'undue influence' exercised by the former over the latter, will set aside the contract. Further, Equity even presumes the existence of undue influence in certain relationships, e.g. parent and child, ex-guardian and former ward, ex-trustee and former beneficiary, clergyman and parishioner, physician and patient, lawyer and client. And, unless the more experienced party can prove that he dealt with the other at arm's length, he will not be allowed to enforce the contract. But, according to the general rule of Equity, any third party who has *bonâ fide*, innocently, and for value, acquired an interest under the contract, will be protected. This is the case, even when, as in the case of money-lenders, the right to obtain relief is statutory. But, of course, any person who, being aware of his right to set aside a contract on the ground of duress or undue influence, deliberately abstains from doing so when he is free from the influence, will be deemed to have confirmed the contract.

*Fraud* implies a deliberate and successful deception of one of the parties to a contract by the other or his agent, with a view of inducing the deceived party to enter into the contract. No party to a contract who was not actually deceived by another party to the contract can claim to set aside the contract on that account ; and the deceit, to be operative, must be a misrepresentation, deliberate or reckless, as to a material fact, which did influence the deceived party to enter into the contract. Thus, if parties are bargaining as to the sale of a race-horse, an untrue statement by the seller that the horse fetched five hundred guineas at a previous sale might, if believed and acted upon, annul the sale ; but a statement of opinion, even though wildly improbable, that the horse was "bound to win the Derby next year," would not. As we shall see in the next chapter, fraud gives rise also to an independent action for damages at the Common Law.

Equity, however, went much further than the Common Law in recognizing misrepresentation as a ground for invalidating a contract. For it was long ago decided,

that even an innocent misrepresentation on a material fact likely to influence, and actually influencing, the mind of the other party in deciding to enter into the contract, would be a ground for setting the contract aside. Thus, if the seller of a professional practice, quite innocently, overstated his professional income, or a company in its prospectus inviting applications for shares stated that it had, in fact, obtained powers to lay a tramway line when it had not, then the party deceived by such statements, even though they were made in perfect good faith, could get the contract set aside; except so far as innocent third persons had acquired rights under it for value. But, as Equity had originally no power to award damages, no action for damages will lie in such a case against the party making the misrepresentation, except in certain cases of statutory liability for false prospectuses.

*Mistake* is a ground for setting aside a contract in certain cases. But it must be carefully understood that 'mistake,' in this connection, does not mean an error of judgment, or a failure of skill, but only a misapprehension of material fact. Very often a man who makes a foolish investment is said to have 'made a mistake'; but that will be no ground for setting aside the contract. So also a man who buys a picture, believing it to be a Rubens, but being, in fact, mistaken, will have no remedy—unless, of course, the other party either deliberately deceived him, or he made it a condition of the sale that the picture was by Rubens.

'Mistake,' to be operative, must be a misapprehension as to a material fact, going to the root of the contract, which misapprehension arose independently of negligence on the part of the person seeking to set aside the contract. Of course if it was induced by the deliberate act of the other party, that will be the case of fraud, already discussed. But, apart from the fault of the other party, if the party seeking to avoid the contract is under a misapprehension as to the nature of the transaction (e.g. signs a bill of exchange believing that he is only witnessing a will), or the identity of the other party (sending an order

by post to A, believing him to be B), or the existence or identity of the subject-matter (agreeing to buy non-existing wheat, or flax under the impression that it is hemp), he will be able to get the contract set aside, even at law. And, even for certain minor mistakes, if both parties are equally in error, Equity will set aside the contract unless the party seeking to enforce it will carry out the contract according to the common belief of the parties when the contract was entered into. Thus, if two relatives are bargaining for the sale of an old family relic which they assume to be worth about £50, and, when the bargain is concluded, it turns out that it is worth about £500, the Court would probably, in spite of the maxim *caveat emptor*, cancel the bargain; unless the purchaser would agree to pay something like the real value of the article. And, for even smaller mistakes than that, if the Court thinks that it would be unreasonable of one of the parties to insist on the bargain, it will, in its discretion, refuse to give him a decree for the equitable remedy of specific performance, leaving him to his legal remedy for damages, for what it may be worth.

3. *Valuable consideration*.—We have already discussed, at some length, the nature of this important essential of a simple contract, and need here only add a few words as to its various forms.

It was probably the earlier view of valuable consideration, that it consisted of some act already done (a *quid pro quo*, as it was called), which induced the ‘undertaker’ to give his promise. This view would, nowadays, be considered as dangerous, if not absolutely heretical. Such a consideration would be stigmatized as a ‘past consideration,’ which will not support a simple contract. Thus if I, moved by gratitude towards a man who has rescued my child from drowning, promise by letter to give him £100, that promise will not be legally binding on me; because the man’s services were not given in return for the promise, but independently of it. If, however, seeing my child in danger from drowning, and being unable to swim, I say to a man: “Save him and I’ll give you



£100," and he does so, that will be a perfectly binding contract. It is the offer of a promise for an act, the performance of which act concludes the bargain. Such a contract is often called 'executed'; but this is misleading. It is the consideration which is executed, not the contract. And it is not 'past' consideration; because it is given *in return for the promise*.

But it soon became evident, that a promise itself could be valuable consideration for another promise. Indeed, the bulk of everyday contracts would be cut out, unless this were possible. A man offers to do a day's work in my garden if I will 'give' him five shillings. What he really means is, if I will promise him five shillings if he does. If the bargain is struck, his promise to work is 'valuable consideration' for my promise to pay him five shillings if he does. Such valuable consideration is said to be 'executory'; and each of the parties to such a contract occupies the position both of promisor and promisee. This is the offer of a promise for a promise; and it will be observed that, unlike the case of the man earning the reward, the contract is here binding from the moment the mutual promises are exchanged, while in the earlier case, it did not become binding till the act of rescue was performed.

In strict theory, the consideration must "move from the promisee," i.e. no party to a contract can sue on a promise in it unless he himself provided the consideration for the promise. Some recent cases are not very easy to reconcile with that theory; but the matter is too difficult to be discussed here. It is, however, as previously mentioned, perfectly clear that no one can sue on a contract who is not a party to it, or does not represent a party.

It is, however, almost equally important to remember, that English Law, though it demands valuable consideration as an essential of every simple contract, written or unwritten, does not, with rare exceptions, concern itself with the adequacy of the consideration. It leaves the parties to make their own bargain. There may be scores of good reasons why a tradesman should be willing to

‘do a job cheap,’ or a professional man be prepared to undertake work at low remuneration, or the owner of a house be glad to get rid of it at an under-value. Only where the inadequacy of the consideration is so gross as to suggest fraud or mistake, does the law take any serious notice of it, or when, as in the case of ‘restraint of trade’ (to be hereafter explained), the Court is enforcing a principle of public policy. Even in sales of future interests, which at one time could be set aside on the ground of inadequacy of price, the general rule now prevails.

But, as has before been hinted, when the theory of the simple contract was evolved in the sixteenth century, there had already long been recognized by the English Courts a limited number of ‘formal’ contracts, i.e. arrangements of at least a semi-contractual character, embodied in forms such as *cognovits*, sealed writings, tallies, and the like. It was impossible to ignore these arrangements, which had been enforced in the King’s Courts for centuries; and it was deemed equally impossible to insist on their conforming to the new requirement of valuable consideration. At the present day, the only class of these formal contracts which survives as a contract is that embodied in sealed writing. The bond, and the covenant in a deed, are typical examples. These are binding at law without valuable consideration; but Equity will not, in that case, aid them with its remedy of ‘specific performance.’ Moreover, they are often postponed, even at law, to claims founded on valuable consideration.

The mention of the ‘form’ of a contract suggests a mention of those classes of contracts which, by the provisions of the law, cannot be made the basis of an action unless they are evidenced by writing. But there is danger in dealing with the two subjects together; for whereas, in a ‘formal’ contract, the form is essential to its validity, in the classes of contracts with which we are now dealing, the written evidence is only essential to their proof in an action. The best testimony to the truth of this fact is, that even where there is written evidence of a simple contract, there must still be valuable consideration—in fact, except

in the case of guarantees, the consideration must actually be mentioned in the written memorandum.

We have already referred to the requirements of the Sale of Goods Act in the case of the sales of goods above the value of £10. There remain to be mentioned only the other classes enumerated by the Statute of Frauds, as requiring written evidence as a condition of their enforcement by action : (i) a promise by an executor or administrator to be answerable out of his own money for any of the deceased's liabilities, (ii) a promise to be answerable for the debt, default, or miscarriage of another (for which that other remains responsible), commonly known as a 'guarantee,' (iii) a promise made in consideration of marriage (other than the promise to marry itself), (iv) an agreement to create or transfer an interest in land, and (v) an agreement not (intended) to be fulfilled within a year from its making, e.g. an engagement of an official or servant for two years certain. Almost every word of this famous enactment has been the subject of litigation ; and it is quite doubtful whether it has not produced more 'frauds and perjuries' than it has repressed. But we cannot enter into these questions.

4. *Lawful object.*—A contract must envisage a lawful object, or, perhaps, it might be simpler to say, it must not contemplate, directly or indirectly, an unlawful object. To ask the Court to stultify the purpose for which it exists by enforcing a contract intended to attack the law, would be unthinkable. But so elastic is the English theory of contract, that it would be hopeless to attempt to enumerate all the lawful objects which a contract may contemplate. It is only possible, very briefly, to indicate one or two classes of objects which it may not contemplate.

Needless to say, any contract aiming at the perpetration of actual crime (including the compounding of a felony) is invalid ; and no rule of evidence prevents the Court going behind even a deed to ascertain for this purpose the real intentions of the parties. A contract for which any part of the consideration is illegal, is wholly void. Where the consideration is lawful, and there are in the



contract some promises lawful and others unlawful, the former may be enforced, if they can be performed without reference to the unlawful ones.<sup>1</sup>

But some objects, though not in themselves absolutely unlawful, are said to be so contrary to the 'policy of the law,' that no contract to attain them is valid. For example, any contract contemplating irregular sexual intercourse, the procurement of marriage for reward, the future separation of married people, gambling or betting, fraud on the public, evasion of public duty, defeat or delay of creditors, or the stifling of prosecutions (even for misdemeanours) will be invalid, despite the fact that some of these acts are not criminal, or even breaches of the civil law. Perhaps the most interesting is the so-called 'restraint of trade.' It is said to be the policy of the law to encourage every one to make the best use of his faculties, especially those faculties which assist economic progress. Consequently, any contract binding a man not to carry on any trade or calling, is, *primâ facie*, invalid. But there are two cases in which the law recognizes qualified restraints of trade as 'reasonable.' One is where one man is taking another as partner or employee, in which positions the latter will certainly acquire opportunities of learning the business and connections of the former. Here the former may stipulate, for adequate consideration, that the latter, on the termination of the connection between them, shall not set up, for a certain time and within a certain distance, as a business rival. Again, we have seen that, if A sells the goodwill of his business, of his own free will, to B, apart from express contract, he cannot 'derogate from his own grant' by setting up in competition with B. But B may prefer to have the restrictions of

<sup>1</sup> It seems worth while to explain in a short note the distinction between laws, especially Acts of Parliament, which may be called 'peremptory,' and those which may be called 'optional.' The former class, dealing with relationships between persons, lay down hard-and-fast rules which enjoin or forbid certain arrangements, whatever the parties may agree to the contrary. An example is the rule that a security bill of sale must not be given for less than £30. Any clause in a contract attempting to exclude this rule would be void. The latter class merely lays down rules which apply subject to any agreement to the contrary. These rules can, of course, be varied by contract.

A's activities specified in the contract of sale ; and, for adequate consideration, and if the restrictions are no greater than are reasonably necessary to protect the purchaser, this contract will be valid.

### PERFORMANCE OF CONTRACTS

A person who has entered into a lawful contract must fully perform all the liabilities which he has undertaken in it ; and, if he does not do so, he will be subject, in all cases, to an action for damages, and, in suitable cases, to a decree for specific performance or an injunction. The nature of these remedies has been explained in a previous chapter ; but, in view of what has just been said about the unwillingness of the Courts to enforce contracts 'in restraint of trade,' it may be mentioned that no injunction will be granted against a man attempting to carry on his calling generally, even where he has bound himself by contract not to do so. For the Court regards such an injunction as condemning a man to slavery ; and, even in cases in which the contract is technically lawful, will leave the other party to his remedy in damages.

A more difficult point requires a few words of explanation.

It is a firmly-established rule of law, dating from the disturbances of the Civil War, that no events, however untoward, happening subsequently to the making of a contract, can relieve a party to it from fulfilling his promise. If, for example, a man has contracted to pay a certain rent for a farm or house, even if the farm is destroyed by a flood, or the house by fire, after he has taken possession, he will still be obliged to pay his rent—unless, of course, the destruction occurred through the landlord's fault, or the contract itself provides otherwise. The rule does not apply to liabilities imposed by law ; but the view of the Courts is, that if a man voluntarily enters into a contract, he must perform its stipulations. If he had wished to guard himself against certain contingencies, he should have done so in the contract itself.

But this rule, if pushed to its full extent, sometimes results in consequences so harsh, that, in modern times, the Courts have admitted certain exceptions from it. These are four in number.

(i) Where an act, perfectly lawful at the time when the contract was made, subsequently becomes illegal before the time fixed for performance, the party undertaking to perform it is excused. He cannot be made to break the law. Whether the other party is entitled to a rebate of his valuable consideration in such circumstances, is a matter which does not seem to have been discussed by the Courts.

(ii) Where a contract is clearly framed on the assumption that a certain object, essential to the performance of the contract, will be in existence when performance becomes due, then, if that object is accidentally destroyed, or perishes, before that date, the party who promised to do something on the faith of that assumption is excused. Thus a contract for the hire of a theatre which is accidentally burned down before the arrival of the date fixed for the beginning of the tenancy, will not bind the owner of the theatre ; and, probably, the hirer, if he had paid his rent in advance, could get it back.

(iii) If there is a total failure of the object for which a contract was entered into, before performance becomes due, the contract is cancelled from that date. The chief illustrations of this exception are the so-called 'Coronation cases,' in which the sudden postponement through illness of King Edward VII's coronation upset the arrangements of thousands of people who had paid, or agreed to pay, substantial sums for hire of windows to view the Coronation procession, berths in steamers to witness the review of the Fleet, and the like. It was held, as a legitimate expansion of exception (ii), that all these contracts were made on the assumption that the Coronation would in fact take place on the day announced, and would not, but for that assumption, have been entered into. Somewhat inconsistently, however, it was held that purchasers of seats, who had paid the whole, or part, of their price in



advance, could not recover it. The maxim was said to be :  
 “ Where the tree falls, there let it lie.”

(iv) Finally, the immense dislocation of affairs produced by the Great War induced, or brought to light, a further development of the doctrine that a radical change of circumstances may relieve a party to a contract from his obligations. This new development is known as the doctrine of ‘frustration of adventure.’ Where, for example, a contract had been entered into before the outbreak of war, which, as a consequence of the outbreak, became either illegal during the war, or physically impossible of fulfilment, or only capable of being fulfilled at a ruinous loss to the party undertaking performance, the Courts, in not very well-defined circumstances, excused the latter from fulfilment of his obligations. It is an extension of the doctrine of *rebus sic stantibus*, which is said to govern the application of international treaties. It is a very dangerous doctrine, but almost inevitable in certain times. What is called a ‘moratorium’ is only an instance on a great scale of the same doctrine ; but this can only be imposed by statute.

There remain to be mentioned now in connection with the Law of Contract, two incidental groups of relationships, one of which is a true, but peculiar example of contracts, the other is not a true example of contract at all, but is closely connected with it.

The first are known as ‘special contracts,’ such as sale, hiring, service, agency, bailment, and the like. These are, in fact, the ancient social relationships out of which, as we have seen, the modern Law of Contract was developed. But, by reason of that very antiquity, they retain some peculiar features which do not apply to the general run of contracts. It is impossible to set out those features here. Almost every one of these special contracts has been made the subject of a separate learned treatise or treatises, which the reader should consult if he desires further information about it.

The second group is known as 'quasi-contracts.' These are not, in truth, contractual relationships at all, but are treated, for various reasons, 'as if' (*quasi*) they were. For example if, under a *bonâ fide* mistake of fact, A voluntarily pays to B a sum of money which he (A) thinks he owes B, but does not, then, if B refuses to return the money, A can sue him in quasi-contract, for 'money paid by mistake.' So also, if a third party remits money to B to be forwarded to A, and B refuses to pass it on, A can recover it from B as 'money paid to the use of A.' In neither case has B contracted to repay or pay A, nor is there any valuable consideration between them. But, as Lord Mansfield said, on grounds of natural justice (in other words, equity and good faith), B is bound to repay or pay the money; and he ought to think himself lucky that he is only sued in quasi-contract instead of being criminally prosecuted. The chief instances of quasi-contract, in addition to those mentioned, are money due on account stated, money due under an Act of Parliament, money paid at the defendant's request, and money wrongfully obtained from the plaintiff by the defendant *colore officii*, i.e. under cover of his (the defendants) official position.

## CHAPTER XXIX

### LAW OF OBLIGATIONS (*continued*). 2. TORTS

A TORT is a civil wrong, not being a breach of contract, for which an action for damages lies at the Common Law. Although, as we have seen, Equity will lend its valuable remedy of injunction to prohibit the commission of a threatened tort, yet the Law of Torts is almost as exclusively a Common Law matter as the Law of Trusts is a matter for Equity.

Observe the expression: 'Law of Torts,' not 'Law of Tort.' For, unlike the Law of Contract, the law affecting torts has not, at present, passed beyond the somewhat rudimentary stage in which it recognizes the existence of certain torts, but fails to find any general principle which will enable us to know a tort when we see it. The Law of Torts is largely a matter for the memory; there is no general theory of Tort, as there is of Contract. Nor does there even seem to be, in some cases, any sound principle which distinguishes an act which amounts to a tort from one which does not. For example, if A, wilfully and without reasonable excuse, persuades B to break his contract with C, that is a tort by A against C. But if A maliciously induces B to revoke a will made in favour of C, by a statement which, to A's knowledge, is calculated to prejudice B against C, or even is, without being strictly defamatory, untrue to A's knowledge, A commits no tort against C.

It follows, therefore, that there is little that can be said of a general nature about the Law of Torts, and that what little there is more properly belongs to other branches of the law, such, for example, as the rule that a husband is liable for his wife's torts, which has already been discussed under the relation of husband and wife. Our treatment



of the subject will, therefore, consist of a statement of the very few general rules affecting all torts, and an enumeration and explanation of the more important torts. Happily, by reason of the fact that many, if not most, torts are also crimes, we need not repeat the definitions of those which have already been given in the chapters on Criminal Law, except in cases where the two definitions differ.

It is a general rule that, unlike claims arising out of contract, claims arising out of torts cannot be pursued after the deaths of either the wrong-doer or the party injured. *Actio poenalis moritur cum personâ*.<sup>1</sup> The exceptions are (i) that for tortious injuries to land (e.g. trespass), committed within six months prior to his decease, the personal representative of either party may sue or be sued within a limited time after his decease, and for misappropriation of chattels of or by a deceased person within six months before his decease, his representative may sue or be sued; (ii) the relatives of a deceased person who met his death by the tortious act or omission of another may, through the deceased's personal representative, sue that other for damages. But, for example, if A libels B, and dies before B can get judgment in an action against him (A), B's claim is gone; and, conversely, if B dies before getting judgment, his representative cannot carry on the action against A.

No claim in pure tort is transferable by act of the parties, notwithstanding the general assignability of things in action. But where the claim is only technically in tort, e.g. when it is really a claim to recover property, it can now be assigned, in spite of the attitude of the Common Law, and even of Parliament, towards 'champerty,' and 'maintenance.' A purely speculative and personal claim in tort cannot, however, be assigned, e.g. a claim for libel. But there may be an assignment of moneys to arise from such a claim, when actually received.

<sup>1</sup> This maxim, said to have been originally derived from St. Augustine, became corrupted in legal phraseology into *actio 'personalis,'* which is misleading. An action on a contract is 'personal'; but it frequently survives against the estate of a deceased contractor.

As a rule, there can be no tort without the intention or the negligence of the alleged tort-feasor. What exactly intention and negligence mean in various torts, will be considered later on ; but it may be taken that every true tort is an unlawful act or omission. There are, however, a few cases of what is called ' absolute liability ' for loss caused by objects under, or supposed to be under, the control of the defendant, which are always classed as torts, even though the defendant may have been guilty of no unlawful act or omission. These cases are interesting and important ; and a word must be said about them. Some of them, though not all, are cases of so-called ' vicarious liability.'

(i) A man is liable for the damage to another's land done by the former's cattle trespassing thereon. This rule does not apply to the case of cattle lawfully on the highway wandering on to unfenced fields which border it ; for a man is under a duty to fence his lands which abut on the highway. But it does apply to cattle straying from a man's field to his neighbour's ; for the latter is not (in the absence of express agreement or special custom) bound to fence against him. A case which excited much interest a few years ago raised the question whether the rule of liability for trespass of cattle extended to damage to other animals, or, presumably, human beings ; and, after long discussion, it was held that it did not. ' Cattle,' for this purpose, includes all domestic animals, such as horses, oxen, sheep, pigs, etc. ; but it does not include animals *ferae naturae*, or non-domestic, which stand on a different footing. I am not liable if my cat destroys my neighbour's pigeons ; even though (as cats will) it trespasses on my neighbour's land to do it.

(ii) Liability for wild animals (*ferae naturae*) stands on a different footing. A man who keeps a dangerous animal (i.e. dangerous to mankind) is absolutely liable if it escapes and injures any one ; and the same is true of an animal usually ranked as domestic, which, to the knowledge of the defendant, is dangerous in certain directions. The dog is a *tertium quid* as regards the law ; but he gets the

benefit of the doubt in this respect, except in the case of an attack by him on cattle, horses, mules, asses, sheep, goats, or swine, which are protected by special statute. In their cases no *scienter* (as it is called) need be proved ; and the dog is not 'entitled to one worry.' But for other domesticated animals who do damage of a kind which it is unusual for such animals to commit, the owner is not liable, unless he knew of their special propensity ; for instance, if a hen gets between the spokes of a passing bicycle, and throws its rider.

(iii) Finally, there is what is known as the Rule in *Fletcher v. Rylands*, probably based on the analogy of the dangerous animal. It is not unlawful (in the absence of special statute) for a man to bring on to his land materials, such as water, or poisonous trees, or gunpowder, which, in their proper uses, are beneficial. But if he does so, and such articles escape or explode, and do damage to his neighbour's land, or cattle, or buildings, he is liable, without proof of negligence, for the loss thus caused ; unless the escape or explosion were occasioned by the 'act of God,' i.e. an event of such unprecedented and unexpected character, that no human foresight could have guarded against it. A man who saves his own land from an advancing flood by turning the water coming on to it on to his neighbour's, is not, however, liable ; because he did not bring the flood on his own land.

At one time this doctrine of 'absolute liability' even applied to fire. It is said that if a man lit a fire in his own house, he lit it at his peril. If it escaped and burned down his neighbour's, he was liable. But this extreme liability, more suitable for the days in which fires were regarded as luxuries rather than necessities, was mitigated by statute in 1774, after a previous attempt in 1707. The wording of the statute of 1774 is peculiar, being confined to the protection of persons on whose estate a fire shall 'accidentally begin' ; and, it would seem, though the point has not yet been definitely settled, that the protection of the statute cannot be claimed by any defendant whose fire was deliberately lit by him (even for the



most innocent purpose), but only for cases of *vis major*, or fires lit by strangers. It is an odd conclusion ; and one can only refer to the fact, hitherto seemingly overlooked, that the common law writ was for "negligently guarding his fire."

The 'absolute liability' for the escape of fire extends also to things like tractor engines emitting sparks, when driven along the highway.

If a lawyer might venture to criticize the doctrine of 'absolute liability' laid down in the cases just summarized, his criticism would probably take the form of suggesting that it was, really, quite unnecessary to make a separate and rather anomalous category, inconsistent with the general rules of torts, for the purpose of accommodating a class of cases which might quite well have come under the general head of Negligence. It is quite true, of course, that in keeping a wild animal, or filling a reservoir with water, the defendant is not necessarily guilty of negligence—much less when he keeps ordinary domestic animals. But he is negligent when he permits them to escape and do damage to his neighbours ; and the exception of 'act of God' in certain cases, above alluded to, is unconscious testimony to this truth. In fact, the only reason why all these cases should not be included under Negligence appears to be that, with his ingrained Puritanical cast of mind, the Englishman persists in regarding 'negligence' as something which implies moral guilt. In reality, it is a mere omission (which may occur for the most virtuous reasons) to fulfil a positive legal duty towards the complainant.

Inasmuch as the limits of this work have not permitted even a short description of what is now regarded as the contract of service, it becomes essential to point out, in dealing with the Law of Torts, that the relationship of master and servant involves the master in liability towards third parties for the torts of his servant, in a way quite different from that in which he is liable for the acts of persons with whom he has entered into ordinary contracts, e.g. of agency, building operations, and the like. In

the latter cases, the principal or employer is liable only for such torts of his employee or builder as he actually or implicitly authorized. But, in the case of a servant, he is liable for much more, as a survival, doubtless, from the old days in which the relation of master and servant was not regarded as arising out of contract. Unfortunately, this fact has not always been recognized; and there has been an attempt to base the master's liability on the ground of implied agency, and to limit it to such torts as he may be presumed to have authorized. Such a doctrine is wholly inadequate to cover the cases; and the true doctrine is, that a master is liable for the torts of his servant done on the master's behalf in the course of his service. When the tortious act or omission is clearly the result of the servant acting 'on his own,' then the master is not liable. But if the servant is acting as such, the master is liable, even though he never contemplated the servant's conduct, and would have forbidden it if he had an opportunity. In one case, indeed, the master was held liable, though it was proved that he had expressly prohibited the conduct which caused the injury. But perhaps that was rather on the analogy of: "Don't nail his ears to the pump."

The test which distinguishes the servant from the other classes of agents, for whom the employer takes much less vicarious responsibility, is, that the former is supposed to be much more under the control of the employer than the latter. In the case of the 'independent contractor,' the employer stipulates mainly for a result, and leaves the employee (within limits) to produce it as to him (the employee) seems best. In the case of the servant, the master retains the right to dictate the means and methods, as well as the result.

As a last general matter applicable to the Law of Torts, we may instance the distinction between those torts which are actionable *per se*, and those which are only actionable when pecuniary loss is proved. Among the former may be mentioned trespass, whether to person, land, or chattels, libel, violation of public rights (e.g.

right to use a highway), disturbance of certain 'incorporeal hereditaments,' and certain special cases of slander. Most of the other torts recognized by English Law are actionable only on proof of actual loss by the plaintiff. The distinction appears to be almost accidental, or to be, at most, a matter of procedure. Trespass was, originally, quasi-criminal, and, therefore, required no proof of pecuniary loss. Libel originated in the Star Chamber, which was a criminal rather than a civil tribunal. The importance of preserving public rights is so great that, where a private individual is allowed to enforce them at all, he ought not to be compelled to show private loss. On the other hand, most of the other torts developed out of the 'action on the case' authorized by the statute of 1285, which regarded actual loss as 'the gist of the action.' A hypercritical person might say that the whole thing was a question of proper definition. A trespass is an invasion of possession; an ordinary slander is a causing of loss by the speaking of defamatory words. But the distinction should be borne in mind.

We now come to the final stage of our consideration of the Law of Torts, viz. the definition and brief consideration of specific torts. Fortunately, as has been said, it will be found that, as many acts and some omissions are both crimes and torts, we have already covered a good deal of the ground in dealing with the Criminal Law, and need not repeat the process. For this reason, it will be well to follow, so far as possible, the grouping adopted in dealing with crimes.

### TORTS AGAINST THE PERSON

1. *Trespass*.—As has been before said, any act which infringes the possession which a man has of his body is a trespass, and gives rise to an action, without proof of actual loss or damage. The three varieties of it—assault, battery, and false imprisonment, are precisely the same as those dealt with by the Criminal Law; though the Law



of Torts does not distinguish between the various degrees of assault, leaving that to the flexible measurement of pecuniary damages, assessable by the jury.

But there is one defence open to a person sued in civil trespass which is certainly not open to any one prosecuted for one of the more serious forms of assault known to the Criminal Law. This is the defence of 'consent.' Trespass being defined as an interference with the possession of the plaintiff against his will, or, at least, without his consent, the consent of the plaintiff is a complete answer in civil cases—*volenti non fit injuria*. Thus, though both parties can be prosecuted for an attempted 'suicide pact' or a prize-fight, neither can sue the other for assault in respect of either. But it should be observed, that the mere fact that the plaintiff knew of the existence of a danger does not prove that he consented to it; as, for instance, if a workman knows that a dangerous process is being carried on near the spot at which he works, but, not wishing to lose his job, says nothing about it. Moreover, the maxim does not apply if the defendant was under a statutory or other duty to protect the plaintiff; and, in any case, the alleged consent must be genuine, based on a real apprehension of the nature of the alleged trespass, and not merely colourable.

2. *Deliberate injury other than trespass.*—It is only of recent years that the Courts have taken notice of physical injuries inflicted without trespass or negligence. The Common Law knew little of nervous shock, which it treated lightly as 'the vapours.' But the physical effects of purely mental shock were strikingly seen in a case decided just at the end of the nineteenth century, when the defendant, with that peculiar idea of humour which is associated with so-called 'practical jokes,' deliberately informed the plaintiff that her husband had met with a serious accident, and was lying in a hospital. There was not a word of truth in the statement, as the defendant well knew; and the result was, that the plaintiff became seriously ill. Though admitting that there was no precise authority in point, the learned judge held, and his view

of the law has since generally been regarded as sound, that the plaintiff might recover damages for the physical suffering she had incurred. The essential thing is, as it was put by the presiding judge of the Court of Appeal in a very recent case, that the defendant has "wilfully done an act calculated to cause physical harm to the plaintiff . . . and has in fact thereby caused physical harm to her." Apparently, so far, in this class of case, the act must be done directly to the plaintiff.

Most of the few cases on this point appear to have been cases in which the act was the act of speaking. It cannot, however, be doubted that still less equivocal acts, such as the sending to the plaintiff of food calculated to make him ill, or withdrawing the bolt of a trap-door over which he was about to walk, would, if physical damage resulted to the plaintiff, be actionable, though they did not amount to trespass. Nor need the last human agency be that of the defendant. In a historic case, the defendant threw a lighted squib into a market-place. Naturally, the person on whose stall it landed picked it up and threw it as far away as he could, regardless of consequences. In this way, the squib finally reached the plaintiff, whose eye it damaged. The defendant was held liable to the plaintiff, whom he had never seen, and never intended to injure. This case clearly proves that there need be no malicious intent (in the ordinary sense of the words) on the part of the defendant towards the plaintiff, to make him liable in trespass.

3. *Negligence*.—We now come to one of the least settled and most perplexing branches of the Law of Torts, covering both person and property.

In theory, the legal definition of negligence is clear. It is the omission to perform a positive duty enjoined by law on the defendant towards the plaintiff, with the result of causing loss to the plaintiff. It is distinguished from the omission to perform positive duties imposed by contract, or by a trust relationship, which stand on a different footing. As we have seen, it is sometimes, but rarely, a crime as well as a tort.

One great difficulty is to remember always that the essence of Negligence is omission, not action. The phrase "doing a thing negligently" may, perhaps, be permitted; but the expression 'negligent act' is a contradiction in terms. To speak of the defendant's act in the squib case as negligence is absurd; and it was, probably, the realization of that fact which caused the majority of a divided Court to class the case as Trespass. But, now that a place has, as we have seen, been found in the Law of Torts for mischievous acts which are certainly not Trespass, it may be hoped that the nature of negligence will be more clearly understood.

But the greatest difficulty is to know *when* the law, apart from contract and trust, casts a positive duty on the defendant towards the plaintiff, the omission to perform which is negligence. And, in a strongly individualistic system like the Common Law, there was surprisingly little of this kind of liability. That is why, until the beginning of the nineteenth century, there are scarcely any reported cases of pure negligence in the common law courts. Then, with a change of ideas and surroundings, the law also changed; and the judges, slowly reflecting public opinion, began to build up a doctrine of Negligence. Nevertheless, it may be doubted whether the public generally realizes the narrowness of its scope.

Negligence, then, for legal purposes, means the absence of such care or skill as it was the duty of the defendant to render to the plaintiff. And the cases in which it is required under pain of legal consequences may be grouped under four heads.

(i) Where there is a special relationship between the parties.

Familiar examples of duties under this head are those of a railway company to carry passengers safely or to deliver a passenger's luggage, or a doctor or nurse to use reasonable care and skill towards their patient. Substantially, these are cases of contract, and are generally so treated. As we have seen, they played a considerable part in the evolution of the simple contract; and



they are by far the oldest group of Negligence cases. It was, in fact, their absorption into the Law of Contract which made the Law of Negligence for so long a mere fragment. They are useful at the present day to cover cases in which the defendant sets up the objection that in fact he entered into no contractual relations with the plaintiff, e.g. when the patient is a child and the doctor was engaged by his parent, or the passenger's ticket was taken for him by his master.

(ii) Occupiers of land and machinery are, as such, under certain positive duties to different classes of persons with whom they come into contact. With regard to persons coming on the land, or using the machinery, by right or on the invitation of the occupier, the latter is bound to exercise reasonable care to prevent their suffering injury from dangers or defects in the land or machinery. With regard to mere licensees, i.e. persons allowed, without invitation or legal right, to enter upon or make use of the land or machinery, the occupier is only bound to warn them of any latent danger known to him. He is not bound to repair for their sake. With regard to actual trespassers, he is only bound not to set traps for them ; but, of course, such a step would not be negligence but intention.

The liability for the safety of machinery, though it is now interpreted in a very stringent way by the provisions of the Factory Acts, was, until recently, greatly mitigated, so far as employers of labour were concerned, by the doctrine of 'common employment.' By this curious doctrine, an employer was not liable for injuries caused to his workman by a fellow-workman of the same class ; unless personal negligence was proved against the employer. This doctrine was an anomalous exception from the rule which, as we have seen, makes a master responsible for the torts of his servant done in the course of his employment. It is still part of the law ; but its effect has been greatly restricted by the various Employers' Liability Acts, and, where these do not apply, by the Workmen's Compensation Acts ; proceedings under the latter not requir-

ing proof of negligence or tort at all. Still, one does occasionally hear of the defence of 'common employment.'

(iii) Sellers and bailors of articles which they know are intended to be used for particular purposes, or treated in a particular way, must use reasonable care to warn intending handlers of them of dangers which may lurk in such handling. Thus, a consignor who sends by carrier articles which, in the ordinary conditions of carriage, are likely to leak or explode, and do damage, must make good any loss thereby occasioned to the carrier, if he does not clearly warn him of the danger. Needless to say, he will not be able to hold the carrier responsible in such cases.

(iv) A person who uses, by himself or his servants, a thing which, unless handled with care, is liable to injure persons coming into contact with it, is bound to take such care as is necessary to prevent such injury. Thus, where a gas-fitter, employed to repair a gas-meter on the premises of the plaintiff's employer, did it so carelessly, that the plaintiff, going in the ordinary course of his duties into the cellar in which the meter stood, with a light, was knocked down and injured by the explosion, it was held that the gas-fitter was liable to him; though there was no contract or engagement between them.

In all actions founded on negligence, there arises the possibility of the interesting defence known as 'contributory negligence' (i.e. of the plaintiff). The argument is that, admitting that the defendant was negligent, yet the plaintiff would not have suffered harm unless he too had been negligent. For example, A is driving on the wrong side of the road. B, a foot-passenger, not expecting traffic to be moving in that direction, steps off into the roadway without looking towards his left hand, and is injured by A's car. If the jury thinks that the accident would not have happened had B taken ordinary care, B will not be able to recover damages from A; though the latter is, *primâ facie*, to blame. The question is, in practice, very difficult; and, as usual, motorists have been given, far too much, the benefit of the doubt.

The doctrine of contributory negligence is, however,

not very popular with the Courts ; and one or two severe rules restricting its operation have been laid down. For instance, if the defendant's prior negligence had forced the plaintiff to a hasty choice of action at a critical moment, he (the plaintiff) is not deemed guilty of contributory negligence just because he failed to make the ideally best choice. Again, where the plaintiff is a child, he will not be expected to show the same standard of skill in avoiding danger, as an adult ; and any conduct on the part of the defendant which amounts to an invitation to a child to take the course which resulted in injury to him, will prevent him relying upon the child's contributory negligence, or even wrong-doing. Thus it has been held by the House of Lords that a railway company which leaves a turn-table unlocked in its yard, which is in fact capable of being entered by children, is liable if such children, though obviously trespassers, are injured by the turn-table. This is probably the high-water mark of the doctrine.

On the other hand, contributory negligence on the part of an adult in charge of a child may deprive the latter of his action for negligence. The doctrine of 'identification,' though now said to be exploded, has apparently left this mark upon the law.

On the whole, the subject of contributory negligence, as handled by the Common Law, cannot be said to be in a very satisfactory state ; and it would, probably, be better to adopt the Admiralty rule applicable to injuries to ship and cargo by collisions at sea, to the effect that the loss to both parties arising from collisions in which both vessels are to blame should be apportioned according to the degree in which each vessel was at fault, or, if it is not possible to establish degrees of fault, then equally.

Finally, on the subject of negligence, may be mentioned the question which has lately arisen in the Courts, as to how far negligence which, *primâ facie*, is confined in its operation to one person, may give rise to an action by another who has, in fact, suffered by it.

It was held, in a recent case, that negligence of the



defendant's servants in allowing a motor-lorry to run over and injure a child in its mother's presence, where the mother died of the shock, gave rise to an action by the deceased woman's husband for loss of the services which she rendered him in his business. It will be noticed that this was not a question of 'remoteness of damage,' but of remoteness of cause. Further, the question can only arise in cases of negligence, as distinct from intention; for there can be no doubt that if the defendants had run down, or even only scared the little girl, with the deliberate intention of shocking its mother, they would have been liable under the rule established a quarter of a century ago, for loss following nervous shock intentionally administered.

The case above referred to does not appear in the Reports in its final stages. But the real weakness in the arguments which swayed the majority of the Court is obvious. If their reasoning is correct, the fact that the child in question was actually injured, would be immaterial. It would be sufficient if an excited neighbour told the mother (untruly but with complete belief) that the child had been injured; though in fact the child had not been touched. Moreover, any person in a huge crowd who happened to witness a distressing accident caused by the defendant's negligence would be able to sue for damages. Such a prospect might, no doubt, be pleasing to the legal profession. But would it really add to the dignity either of English Law or the English character?

### TORTS IN RESPECT OF PROPERTY

1. *Trespass* and 2. *Negligence* in respect of land and chattels differ little in their nature from similar torts to the person; but their application is, naturally, different. We speak of interference with the possession of land or goods; but what we really mean is the interference with the possession of the occupier or possessor. Consequently, it is the attitude of the latter, not the effect on the land

or goods, which has to be considered ; and an act which may be a trespass to A, the occupier of the land, may be only waste (an action of a different kind) to B the landlord.

The slightest interference with the possession of land or goods gives rise to an action of trespass, whether actual loss is incurred by the possessor thereof, or not. And, in the case of land, trespass may take the form of interference either with the surface, or the sub-soil, or (subject to the provision of the Air Navigation Act, previously mentioned) the air-column above it. The trespasser cannot plead any want of title in the plaintiff, the actual possessor. If he wishes to assert that the possessor's title is bad, he must bring an independent action of Ejectment, if the subject-matter is land, of Detinue or Trover if it is goods.

No proof of actual loss having been suffered need, as has been stated, be proved by the plaintiff in an action of Trespass ; but if no actual damage is done, the damages awarded will be only sufficient to vindicate the plaintiff's rights. If, however, the loss inflicted is serious, the damages awarded will be proportionately heavy. In the case of goods, if the trespass results in depriving the plaintiff entirely of the possession of them, the full value of the goods will, as has been pointed out, be awarded.

There can, of course, be no trespass, either to the person or the property, without intention on the part of the defendant. If, for example, the defendant is pushed against the plaintiff by the surging of a crowd, or thrown on to the plaintiff's lawn by the rearing of a horse, there is no trespass. But it is not necessary that the defendant should have intended to injure the plaintiff. He may, for example, have struck the plaintiff believing him to be some other person, or have ridden over his land believing it to be that of a friend with whom he (the defendant) is staying. Both these acts will be trespasses.

It is, probably, for reasons of this kind that the well-known type of action called the 'running-down case' is treated indifferently in the books as Trespass or Negligence. *Primâ facie*, physical contact between the

defendant and the plaintiff, or anything in the latter's possession, amounts to Trespass; but there is always the possibility that the defendant may plead that his horse bolted with him or his brakes gave way, in which case the Trespass would be disproved, and the case would resolve itself into a question whether the defendant or the plaintiff was to blame for want of care.

Of course, trespass to land or goods may be justified on various grounds, as, for instance, by the authority of the law, or under a license from the plaintiff. In the latter case, there can hardly be said to be trespass at all; for trespass implies opposition to the will of the plaintiff. But the former is certainly trespass, though justifiable trespass; and it is safeguarded by the very strict rule (now slightly relaxed) that any misconduct on the part of the person authorized by law to enter land or take possession of goods (e.g. a sheriff levying execution or a neighbour 'abating' a private nuisance) will make him a trespasser '*ab initio*,' i.e. liable as a trespasser from the first. Another of the justifications for trespass to land is to prevent the spread of fire—a rule which, again, seems somewhat inconsistent with the alleged severity of the Common Law with regard to the liability for fire of an occupier of land. For if such occupier were 'absolutely' liable, why should his neighbours take the law into their own hands?

3. *Nuisance*.—This is a particular kind of tort applicable only to land. It has the widest possible scope, and may be defined as the doing of any act which interferes with the enjoyment by another of his health, comfort, or convenience in the enjoyment of his land. A nuisance may amount to a trespass; but in many cases it does not, e.g. in the case of foul smells, strident noises, obstruction of the access of light to buildings, and so on. It will be observed, that the mere fact that an act depreciates the value of land is not enough to make it, legally, a nuisance. Thus, an owner who pulls down a large house and covers the site with small cottages may grievously depreciate the value of his neighbours' mansions; but he is certainly not



liable for nuisance. And, even where the act complained of does interfere with the enjoyment by the plaintiff of his premises, the Court must take into account the general character of the neighbourhood and the ordinary necessities or practices of business and domestic life. In other words, a nuisance is what an average man, not what an exceptional person, would consider as such. Consequently, there are always cases on the border-line, e.g. at present the use of the gramophone with open windows or in the garden.

One of the special peculiarities of the Law of Nuisance is, as has been mentioned, that a person suffering from it may, to a certain extent, take the law into his own hands, and forcibly 'abate' it, i.e. may physically remove the cause if it is removable. But, before doing so, he must, usually, give notice to the person guilty of the nuisance, at any rate if the nuisance be caused by an omission, not an act; he must not enter on the land of an innocent person in order to abate the nuisance; and he must not use unnecessary violence or do unnecessary damage. In fact, the abatement of a nuisance which involves a trespass is a very hazardous enterprise; and a complainant would be well-advised, in most cases, to apply to the Court for the alternative remedy of an injunction.

4. *Dispossession and Detainer*.—These are torts applicable to land and goods respectively, which consist merely in being in possession of land or goods to the possession of which another person is entitled. They give rise to the actions of Ejectment (in the case of land) and Detinue (in the case of goods), which are simply actions to try the title to the land or goods, without assertions of trespass or the like. They are, in fact, the nearest modern resemblances to the old 'real actions,' for which they were, in fact, substituted; for, if successful, they are (or may be) followed by a judicial writ, whereby the plaintiff is put into possession of the land or goods. It is a rule of the action of Ejectment that the plaintiff must succeed, if at all, through the goodness of his own title, and not through the defects of the defendant's; and, probably, the rule is the same in Detinue, except that there, the defendant is

not allowed, if he in fact received the chattel which is the subject of the action from the plaintiff, to set up the rights of a third party as a defence.

5. *Conversion*.—This is a tort applicable not to chattels only, but to things in action as well as to chattels corporeal. It consists in converting to one's own use chattels to the possession or enjoyment of which another person is immediately entitled. It was introduced in the fifteenth century, to avoid the allegation of force which was necessary to found an action of Trespass, and which might involve a challenge to battle, by 'appeal of larceny.' The plaintiff, to avoid a risk of that kind, alleged that he 'casually lost' the subject-matter, which the defendant 'found and converted to his own use.' Hence the name of Trover long attached to the action in question. The difference between it and Detinue is, that mere refusal to give up the chattel is enough to found the latter action, while Trover cannot be brought unless there is some evidence that the defendant has acted as owner of the chattel, e.g. by selling it, consuming it, pledging it for debt, or endeavouring to realize it. The usual remedy is damages; but, as in Detinue, the Court may order the chattel itself to be delivered up.

It should be particularly noticed, that innocence (i.e. good faith) is no defence to an action of Trover, except in cases expressly provided for by statute. An auctioneer who sells goods which he has been entrusted by A to sell may be guilty of conversion if, in fact, the goods belong to B.

6. *Disturbance*.—This is the name given to the tort of interfering with certain classes of 'incorporeal hereditaments,' e.g. commons, ways, fishing rights, and the like. No loss in fact need be proved by the plaintiff; and herein the action of Disturbance differs from that of Nuisance. A special variety of this action, known as a Quare Impedit, was at one time in frequent use to try the title to present to an ecclesiastical living. But, owing to changes in the law, it has now become almost obsolete.

7. *Waste*.—This is another very ancient tort, the position of which, owing to recent legislation, is now extremely

doubtful. Waste was the improper dealing with land by a life tenant or other limited owner ; and the action (at one time highly penal) could only be brought by the next remainder-owner with an inheritable estate. So far as tenants for years are concerned, apparently the action is unaffected by the new legislation ; but, inasmuch as all future interests in land are now equitable only, it is doubtful whether their owners will be able to bring actions of Waste. Probably the trustees of the settlement will have to act ; but, as the inheritance will often be vested in the so-called tenant for life (the guilty party), there may be difficulties.

8. *Infringement of monopoly rights.*—These are unlawful interferences with the monopolies of patentees, and owners of trade marks and copyright, the nature of which has previously been explained. As in the case of Disturbance, no loss in fact need be proved ; but it is a peculiarity of these actions that damages (the natural remedy) cannot be awarded if the defendant can convince the Court that he acted innocently, not knowing of the rights which he infringed. In the case of patents and copyright, this provision is statutory ; in the case of trade marks, it appears to rest on the decisions of the Judges.

9. *Slander of title.*—A person who ‘ maliciously ’ (i.e. without reasonable justification) publishes false statements, oral or written, calculated to throw doubt upon the title of another to land or chattels of which that other is the owner, or upon the quality of his goods, is guilty of the tort known, in the case of land as Slander of Title, and, in the case of chattels, as Slander of Goods, and is liable to an action for an injunction and damages. It will be observed that this action has nothing to do with slander in the sense of defamation of personal character, and is governed by entirely different rules. Loss in fact consequent on the alleged slander must be proved ; and *bonâ fide* belief on the part of the defendant in the truth of his statement is a good defence, except in the case of a patentee who threatens proceedings for an alleged infringement of his patent. His only proper course is at once to take proceedings for



infringement ; and, if he does not do so, he will be liable to what is called a ' threats action,' which is a variety of the action for slander of goods.

#### TORTS IN RESPECT OF DOMESTIC AND BUSINESS RELATIONS

1. *Seduction*.—This is a singularly clumsy attempt to adapt an old action founded on the Statutes of Labourers of the fourteenth century, to the offence of debauching a woman. The woman herself cannot bring the action, being barred by the maxim : *volenti non fit injuria*. But, if the birth of a child or serious illness follows, her parent, if she is living at home, or her employer, if she is in service, may bring an action for loss of her services. If he succeeds, the damages will, in theory, be paid to him ; and he will be under no legal obligation to employ them for the benefit of the woman. It is unnecessary to dwell upon the many anomalies of this action, which is not now very common. Perhaps the worst is, that it cannot be brought against a genuine employer, who is, too often, the villain of the piece. Very like this action is that against the harbourer of a wife, for loss of *consortium* ; but this action, by reason of the changes introduced by the Divorce Laws, has become almost extinct.

2. *Deprivation of services*.—This is another tort derived historically from the Statutes of Labourers. Stealing a serf was a common offence of mediæval times ; but, with the enfranchisement of serfs, it became, in the view of Parliament and the Courts, necessary to provide against the enticing away of servants. Now, however, that the relation of master and servant is based on contract, it is necessary for the plaintiff to prove in an action for deprivation of services, that there was actually a binding contract of service between the servant and himself, which the defendant induced the servant to break, or (possibly) that he (the defendant) knowingly harboured him after breaking it. Thus the action is really only an example of the wider action for procuring breach of contractual relations, which

will be mentioned below. Moreover, it cannot now be brought in connection with a trade dispute.

3. *Procuring breach of contract*.—This offence is the creation of the last century. It dates from a decision of the majority of the Court of Queen's Bench, which applied the principle of the Statutes of Labourers to the enticing away of a person who certainly could not be described as a 'servant,' from the employment of the plaintiff. The decision, which excited much controversy in the legal profession, was gradually extended in scope, till now it seems to be agreed that it is a tort, knowingly and without lawful excuse, to induce one of the parties to a legally binding contract to break it off, to the loss of the other. It may still be doubted whether the doctrine covers purely isolated contracts, e.g. to build a house. But it certainly has been applied to almost every kind of contract setting up a permanent relationship between the parties to it, e.g. tradesman and customer, principal and agent, employer and employed. Further, it has even been suggested, that, without good cause, to persuade a person not to enter into a contract with another, which that other had a substantial right to expect would be made, is also an actionable tort. But the better opinion appears to be that such an act by a single individual is not actionable.

The action for procuring breach of contract cannot be brought in connection with a trade dispute.

4. *Conspiracy and interference with business*.—These are vague and ill-defined torts, about the nature of which there is much doubt. We have discussed the nature of criminal conspiracy, and need here only add that, historically, the doctrine of civil conspiracy grew out of the attempt to restrain the activities of Trade Unions after the Act of 1871 had laid it down, that such activities no longer made the members of Trade Unions guilty of criminal conspiracy. It was qualified by the important reservation, pronounced in a famous decision by the House of Lords, that it could not be used to prohibit legitimate trade competition; though that reservation left the important word 'legitimate' undefined. It was,

however, used with decisive effect to stop the 'boycotting' of unpopular employers by Trade Unions; and, when this application of the doctrine was abolished by the Trade Disputes Act of 1906, the action for Civil Conspiracy almost disappeared from the Courts. There remains, however, in view of the restricted operation of the Trade Disputes Act, the general doctrine that, if a conspiracy is entered into by two or more persons to cause harm to another, especially in his trade or business, and such harm follows, the victim will have an action for Civil Conspiracy against the conspirators—always supposing them not to be protected by the Trade Disputes Act. And an interesting attempt to apply this somewhat vague doctrine may be seen in the Auctions Act of 1927, which aims at preventing 'knock-outs,' i.e. secret agreements among attendants at auctions not to compete, in order that an object may be secured at a less price than competition would produce. It is true that any one attempting to violate the provisions of the Act may be prosecuted criminally, and that the civil offence created by the Act is termed 'fraud,' not conspiracy. But the essence of the evil at which the Act aims is certainly conspiracy. Apparently, the Act only applies to auctions of goods, not of land.

A still vaguer doctrine of a tort of 'interference with business' by violent acts, e.g. threats, noises, perhaps even false statements, is occasionally prayed in aid; but it is of doubtful practical value. It is just possible that, though the doctrine is expressly banished from trade disputes by the Act of 1906, it may have been revived for certain cases by section 3 of the Trade Disputes and Trade Unions Act of 1927, which deals with threats and intimidation.

5. *Fraud*.—We have already seen, that fraud, i.e. deliberate deceit, may, in certain circumstances, invalidate an apparently valid contract. But it was also decided, rather to the surprise of the legal profession, in 1789, that fraud, whether inducing a contract or not, may give rise to an independent action of Tort, herein differing from an innocent misrepresentation, which, though it may avoid



a contract, does not (save in one exceptional class of cases) give rise to an independent action for damages.

One special importance of this decision is, that, even if a contract is involved, the action for fraud may be brought by a person who is not a party to the contract, if it was intended by the defendant that he (the plaintiff) should act upon the fraudulent statement, and he does so to his own hurt. Thus, in a well-known case, the plaintiff's father bought a gun, stating that it was for the use of himself and his son, from the defendant, who knowingly made untrue statements as to the maker and condition of the gun. The gun burst in the plaintiff's hands ; and he was severely injured. He was allowed to recover damages. Though that case was avowedly decided on the ground of fraud, it is probable that a similar case nowadays would be treated as a case of negligence in supplying dangerous goods. But there is no doubt that fraud, as an independent tort, is fully recognized ; the only difficulty being to know exactly what kinds of loss—personal, proprietary, or commercial—it covers.

Incidentally, however, it may be noted, that the precise form of fraud alleged in the case of 1789—viz. a deception as to the solvency of a person to whom the plaintiff was thinking of giving credit—has been rendered much rarer by the provisions of a later Act of Parliament, which makes such statements no longer a cause of action, unless they are contained in writing signed by the defendant. The case of 1789 was, in fact, an attempt to evade that provision of the Statute of Frauds which requires a guarantee to be evidenced by writing. But the decision, whatever its immediate effect, has certainly given rise to a tort which, if it ever existed as an independent cause of action, had been forgotten centuries before 1789.

### TORTS IN RESPECT OF THE REPUTATION

We come, finally, to a small but important group of torts, the object, or, at least, the effect of which is unjustly

to lower the reputation of a person in the minds of his fellow-men. The seriousness of such offences in a highly organized and closely related community needs no pointing out.

1. *Libel*.—This, as we have seen in dealing with Criminal Law, is the publication, without justification, in written, printed, or other permanent form, of a defamatory statement concerning a person other than the person publishing the statement. No actual loss need be proved in a libel action; though, of course, the plaintiff will, naturally, seek to prove special injury, in order to increase the damages. The tort of libel, however, differs from the crime of libel, in that it is necessary for the plaintiff to prove communication of the defamatory statement to a third person; but this third person may be the plaintiff's wife, though, oddly enough, communication by the defaming person to his own wife, is not such publication as will make him liable to an action for damages. Every one, except a purely mechanical and unwitting distributor, who takes part in the publication of a libel, may be sued; and the provision which, as we have seen, makes a judge's order necessary for the prosecution of a newspaper for criminal libel, has no application to an action for damages. A newspaper proprietor may, however, plead absence of malice in fact or gross negligence, accompanied by a published apology and a payment into court by way of amends.

In another respect civil libel differs materially from criminal, viz. that truth is a complete defence to an action for the former, whereas it is not in all cases to a prosecution for the latter. But, of course, the truth must be the essential truth of the innuendo, not the mere formal innocence of the words. An admirable illustration of the difference is to be found in a case decided by the House of Lords nearly fifty years ago, in which a wealthy firm of brewers, having (rightly or wrongly) been annoyed by the official of a well-known bank, issued a circular to the effect that, contrary to their previous practice, they would no longer "receive in payment cheques drawn on the — Bank." The words were, in their literal mean-

ing, harmless ; but, in fact, large numbers of persons took them to mean that the defendants were not satisfied of the bank's solvency, and a 'run,' with damaging consequences to the bank, followed. The bank brought an action for libel ; and the question of whether the circular was defamatory was left to the jury, who failed to agree. The Court directed a new trial ; but the Court of Appeal, though not unanimously, held that the circular was not capable of a defamatory construction, and in this view they were upheld by the House of Lords, though again with a difference of opinion amongst the learned Lords who took part in the judgment.

The important rules of 'privilege' are substantially the same for civil as for criminal libel ; and there is no need to repeat them.

2. *Slander*.—This tort differs from libel mainly in the fact that it is committed by the utterance of words only, and that it cannot be made the subject of criminal prosecution. But there is another important difference. As a general rule, actual loss consequent on the spoken words (often called 'special damage') is an essential of a successful action for slander. The only exceptions recognized by the Common Law are slanders imputing the commission by the plaintiff of a criminal offence punishable with corporal punishment, or misconduct or incapacity in his office, trade, or calling, or (where the plaintiff is a trader) insolvency, or, finally, that the plaintiff was, at the time when the slander was published, suffering from a contagious disease. But, also, by a recent statute, a woman bringing an action of slander founded on an allegation of unchastity, need not prove 'special damage.'

It has previously been pointed out, that no 'malice,' in the ordinary sense of the word, is necessary to constitute either libel or slander ; though such malice may be a most important question in discussing a question of 'privilege.' A person who publishes a libel or utters a slander does so at his own risk ; and he cannot justify himself by a plea that the statement was 'common rumour,' or even that he learnt it from an apparently



well-informed person. On the other hand, the original utterer of a libel or slander is not liable for the gossip of persons who repeat it; unless they were authorised or instructed by him to do so, or were under a moral duty to repeat his words.

3. *Malicious prosecution*.—As we have seen in dealing with the Criminal Law, false indictments were at one time the subject of prosecution for Conspiracy. For centuries, however, the criminal remedy has been superseded by an action for damages, which can be brought against a single person, and which covers, not merely false indictments, but all forms of criminal prosecution, and even abuse of civil process, such as bankruptcy, arrest, or execution. Inasmuch, however, as it is the duty of the good citizen to prosecute for crimes, the plaintiff in such an action, in order to succeed, must prove (i) that the proceedings in question ended in his favour, (ii) that they were carried on without ‘reasonable and probable cause,’ and (iii) that the defendant, in conducting those proceedings, was influenced by some motive other than the desire to bring a criminal to justice. Technically, the plaintiff ought to prove that he has suffered actual loss by the unsuccessful proceedings. In fact, the scandal arising from such proceedings is usually so great, that loss to the plaintiff is assumed. Malicious Prosecution is emphatically a case in which ‘exemplary’ damages are allowable.

In conclusion, it is necessary to warn the lay reader that, ‘forms of action’ having been abolished, proceedings are no longer officially named after the various offences which they are used to vindicate. But it would be a vast mistake to suppose that a knowledge of the nature of these various offences is superfluous, and that a suffering plaintiff can bring an action of Tort, so to speak, ‘at large.’ He must still convince the Court that his grievance comes within one or more of the established list of civil offences recognized by the law. For, as an eminent jurist has remarked: “The forms of action we have buried; but they rule us from their graves.”

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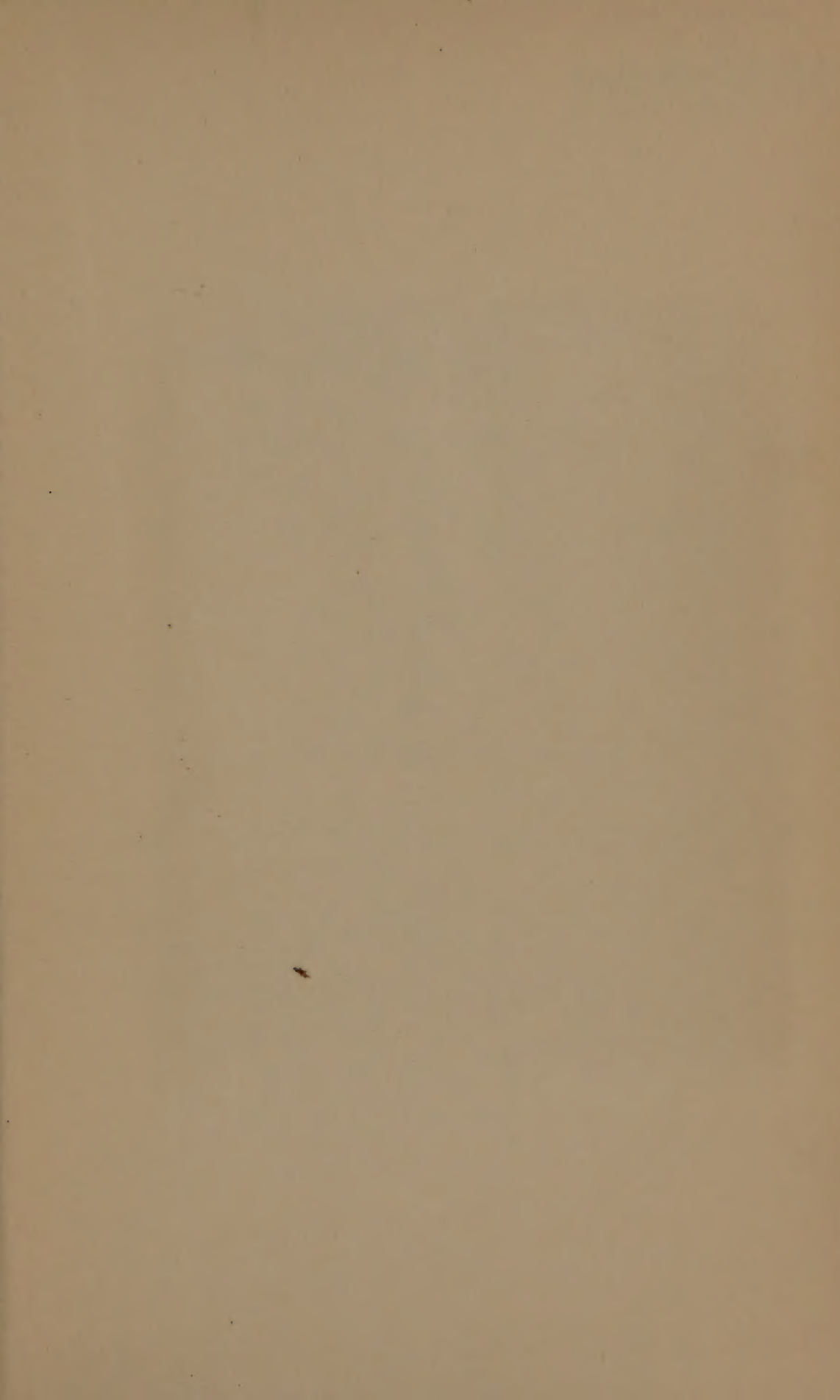
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